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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 195

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BANK OF NEW YORK AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT-APPELLEE

Statement under rule 13

On August 22, 1934, the above-entitled suit was commenced by the complainant, United States of America, against the defendant, Bank of New York and Trust Company, by filing a verified bill of complaint in the District Court for the Southern District of New York and by the issuance of a subpoena.

On August 22, 1934, an order to show cause, supported by an affidavit, was signed, temporarily restraining defendant and requiring defendant to show cause on August 28, 1934, why complainant's motion for an injunction pendente lite should not be granted. On August 23, 1934, the defendant was served with a subpoena, a copy of the bill of complaint, and a copy of the order to show cause signed August 22, 1934.

On August 29, 1934, defendant served on complainant a notice of motion for an order dismissing the complaint for failure to state facts sufficient to constitute a cause of action.

2 Pursuant to notices of motions of the defendant served on the complainant and orders of the district court made thereon and filed on September 12, 1934, and October 1, 1934, complainant filed on September 13, 1934, and on October 1, 1934, verified bills of particulars of the bill of complaint. Argument was had on the motion to dismiss the complaint, and on the motion for an injunction pendente lite before Honorable Alfred C. Coxe, United States district judge, on October 4 and October 6, 1934.

In an opinion dated November 28, 1934, and filed November 30, 1934, Judge Coxe denied complainant's motion for an injunction pendente lite and granted defendant's motion to dismiss the complaint for insufficiency. On December 20, 1934, an order and decree was filed denying complainant's motion for an injunction pendente lite and granting defendant's motion to dismiss the complaint for insufficiency and suspending the operation of the order and decree until the determination of the appeal by the complainant. On December 22, 1934, the appeal was allowed.

3 In United States District Court

Subpoena

E 78/377

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO BANK OF NEW YORK AND TRUST COMPANY:

GREETING: You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a Bill of Complaint exhibited against you in the said Court in a suit in Equity, by United States of America and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you of Two Hunderd and Fifty ($250) Dollars.

Witness, Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, on the 22nd day of August in the year One Thousand Nine Hundred and Thirty-four and of the Independence of the United States the One Hundred and Fifty-ninth.

MARTIN CONBOY,
United States Attorney, Solicitor for Complainant, U. S. Courts and P. O. Bldg., Park Row and Broadway, New York City.

CHARLES WEISER, *Clerk.*

4 The defendant is required to file its answer or other defense in the above cause in the Clerk's office on or before the twentieth day after service hereof, excluding the day of said service, otherwise the Bill aforesaid may be taken pro confesso.

[SEAL] CHARLES WEISER, *Clerk.*

In United States District Court, Southern District of New York

Equity E. 78/377

UNITED STATES OF AMERICA, COMPLAINANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT

Complaint

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The United States of America, by its attorney, Martin Conboy, United States Attorney for the Southern District of New York,

complains of the defendant herein and alleges on information and belief:

5 1. That the complainant herein is a corporation sovereign and body politic.

2. That the defendant was at all times hereinafter mentioned and now is a corporation organized and existing under and by virtue of the Banking Law of the State of New York, with its principal office and place of business at 48 Wall Street, Borough of Manhattan, City of New York, and is an inhabitant and resident of the Southern District of New York.

3. That the Moscow Fire Insurance Company of Moscow, Russia, at all the times hereinafter mentioned, with the exceptions hereinafter noted, was a corporation organized under the laws of the State of Russia, to transact the business of insuring against loss or damage by fire and was authorized by compliance with the requirements of the laws of the State of New York to transact such business in this State; that the said Insurance Company, as part of its compliance with the requirements of the laws of the State of New York, deposited with the Superintendent of Insurance as a fund out of which should be paid the claims of domestic creditors of said corporation, cash securities and other items of value.

4. That heretofore and in the latter part of 1917 and the early part of 1918, or thereabouts, the said Moscow Fire Insurance Company was by decrees of the Russian State, dissolved and all of its right, title, and interest and all the right, title, and interest of all of its stockholders in its property, including the deposit hereinbefore mentioned with the Superintendent of Insurance of the State of New York, were confiscated and appropriated by the said Russian State.

6 5. That heretofore and on or about April 18, 1933, the claims of domestic creditors to the said fund so deposited with the Superintendent of Insurance of the State of New York having been satisfied, the said Superintendent of Insurance, pursuant to an order of the Supreme Court of New York, New York County, directing that the said fund be released, paid, transferred, and delivered to the defendant as agent or depositary of the said Moscow Fire Insurance Company, said fund not to be withdrawn except upon the order of a court of competent jurisdiction, delivered to the defendant, and the defendant received from the said Superintendent of Insurance, the balance of said fund then consisting of cash, securities, and other assets described as follows:

	Par value
City of New York Corporate Stock, 3½%, 1941	$ 500.00
City of New York Corporate Stock, 3½%	30,000.00
City of New York Corporate Stock, 4%, 1955	368,000.00
City of New York Corporate Stock, 4%, 1956	385,000.00
City of New York Corporate Stock, 4%, 1955	215,000.00
United States of America—2nd Liberty Loan Converted 4¼%—1941 (Called for redemption Nov. 1927)	80,000.00
Cash	1,899.54
	1,080,399.54;

7 that the said fund or the avails thereof is now in the possession of the said defendants.

6. That on or about November 16, 1933, the Russian State assigned to the complainant, for a valuable consideration, all of its right, title, and interest in and to the cash, securities, and other assets constituting the balance of the aforesaid deposit, and also assigned to the complainant all the right, title, and interest of all Russian nationals in and to the aforesaid cash, securities, and other assets, and since November 16, 1933, the complainant has been and now is the sole and exclusive owner entitled to the immediate possession of the aforesaid cash, securities, and other assets now in the possession of the defendant.

7. That prior to the institution of this suit, complainant duly demanded of the defendant the said cash, securities, and other assets together with the interest, dividends, gains, and profits thereof but the defendant has refused to deliver the same or any part thereof to the complainant and continues wrongfully to withhold the same from the complainant and now wrongfully possesses the said cash, securities, and other assets or the avails thereof. That as to the complainant since November 16, 1933, the possession of said property by the defendant has been wrongful and the defendant still wrongfully detains the same from the complainant.

8. That by reason of the defendant's possession of the said cash, securities, and other assets received on or about April 18,
8 1933, pursuant to the aforesaid order of the State Supreme Court that the said cash, securities, and other assets would not be withdrawn except upon the order of a court of competent jurisdiction and by reason of the complainant's demand for the said cash, securities, and other assets and the increase and avails thereof and the proceeds thereof, and by reason of the defendant's wrongful refusal to deliver the same or any part thereof to the complainant, and by reason of the defendant's continuing to wrongfully withhold the same from the complainant, the defendant holds the same for the complainant as fiduciary and trustee for the complainant.

9. That the complainant has no complete, plain, and adequate remedy at law for the relief sought herein and therefore institutes this suit in equity.

Wherefore, the complainant prays:

(a) that a subpena issue to the defendant named herein commanding it to appear on a certain day and answer this bill of complaint and to abide by such orders and decrees as this court may make in the premises;

(b) that the defendant herein, its successors, officers, agents, attorneys, employees, or assignees, and all persons or corporations acting under their direction or in their behalf, be enjoined and restrained permanently and pending the determination of this suit from paying out or distributing to anyone other than this complainant any part of the said cash, securities, and other assets or the avails thereof.

9 (c) that the defendant be required by a decree of this Court to make a full, just and complete account under the direction of this Court, and to pay over to the complainant the aforesaid cash, securities, and other assets and the proceeds and avails thereof and all interest, dividends, gains, and profits as have accrued or arisen or have been earned or received therefrom by the defendant and all such gains or profits as would have accrued to the complainant but for the wrongful detention of said cash, securities, and other assets by the said defendant and all damages the complainant may have suffered or sustained thereby;

(d) that the complainant may have such other and further relief as the case may require and the court may deem just in the premises.

MARTIN CONBOY,

United States Attorney for the Southern District of New York, Attorney for Complainant, Office and P. O. Address, U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

10 [*Duly sworn to by Edward J. Ennis, jurat omitted in printing.*]

11 In United States District Court, Southern District of New York

[Title omitted.]

Order to show cause

On the annexed affidavit of Edward J. Ennis, Assistant United States Attorney in and for the Southern District of New York, sworn to on the 22nd day of August 1934 on the verified bill of complaint filed herein on the 22nd day of August 1934 and

It appearing to the satisfaction of this Court that the complainant is entitled to the relief demanded by the bill of complaint in this suit, and

It further appearing that in order to enable this Court to adjudicate the right of the complainant to the cash, securities, and other assets referred to in the complaint, and to effectively exercise its jurisdiction and enforce its judgment it is necessary and proper that the aforesaid cash, securities, and other assets remain in possession of the defendant pending the adjudication by this Court of the rights of the complainant, it is

Ordered that the defendant be and appear before this Court
12 at a Stated Term thereof for the hearing of motions to be held on the 28th day of August 1934 in Room 235 of the Old Post Office Building, in the City, County, and Southern District of New York, Borough of Manhattan, at the hour of 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, then

and there to show cause, if any it has, why the defendant, its officers, agents, attorneys, employees, assignees, successors, and all persons or corporations acting under its direction, or in its behalf, or in privity with it or claiming so to act, should not be enjoined and restrained as prayed for in the said bill of complaint herein, and meanwhile let the defendant, its officers, agents, attorneys, employees, assignees, successors, and all persons or corporations acting under its direction, or in its behalf, or in privity with it or claiming so to act, be stayed, restrained, and enjoined from distributing any of the said cash, securities, and other assets pending the determination of this motion.

Let service hereof be made upon the defendant by service personally upon an officer or authorized agent of the defendant of a copy, which need not be certified, on or before August 22, 1934.

Dated, New York, N. Y., August 22, 1934.

HULBERT, *U. S. D. J.*

13 In United States District Court

[Title omitted.]

Affidavit attached to order to show cause

SOUTHERN DISTRICT OF NEW YORK, *ss:*

EDWARD J. ENNIS, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney for the Southern District of New York in charge of the above-entitled matter.

2. That the Moscow Fire Insurance Company of Moscow, Russia, at all the times hereinafter mentioned, with the exceptions hereinafter noted, was a corporation, organized under the laws of the State of Russia, to transact the business of insuring against loss or damage by fire and was authorized by compliance with the requirements of the laws of the State of New York to transact such business in this State; that the said Insurance Company, as part of its compliance with the requirements of the laws of the State of New York, deposited with the Superintendent of Insur-
14 ance as a fund out of which should be paid the claims of domestic creditors of said corporation, cash, securities, and other items of value.

3. That heretofore and in the latter part of 1917 and the early part of 1918, or thereabouts, the said Moscow Fire Insurance Company, by decrees of the Russian State, and particularly by a decree of the Russian State on the organization of the insurance business in the Russian Republic, a photostatic copy of a certified copy of which and a copy of a certified translation of which are attached hereto and made a part hereof, was dissolved and all of its right, title, and interest and all the right, title, and interest of all of its stockholders in its property, including the deposit hereinbefore men-

tioned with the Superintendent of Insurance of the State of New York, were confiscated and appropriated by the said Russian State.

4. That heretofore and on or about April 18, 1933, the claims of domestic creditors to the said fund so deposited with the Superintendent of Insurance of the State of New York having been satisfied, the said Superintendent of Insurance, pursuant to an order of the Supreme Court of New York, New York County, directing that the said fund be released, paid, transferred, and delivered to the defendant as agent or depositary of the said Moscow Fire Insurance Company, said fund not to be withdrawn except upon the order of a court of competent jurisdiction, delivered to the defendant, and the defendant received from the said Superintendent of In-
15 surance, the balance of said fund then consisting of cash, securities, and other assets described as follows:

	Par Value
City of New York Corporate Stock 3½% 1941	$500.00
City of New York Corporate Stock 3½% 1949	30,000.00
City of New York Corporate Stock 4% 1955	368,000.00
City of New York Corporate Stock 4% 1956	385,000.00
City of New York Corporate Stock 4% 1955	215,000.00
United States of America—2nd Liberty Loan Converted 4¼%—1942 (Called for redemption Nov. 1927)	80,000.00
Cash	1,899.54
	1,080,399.54;

that the said fund or the avails thereof is now in the possession of the said defendant.

5. That on or about April 19, 1933, a suit entitled "Moscow Fire Insurance Company of Moscow, Russia, et al. against Bank of New York and Trust Company, et al.", was commenced in the Supreme Court of New York, New York County, and the complaint therein, a copy of which is attached hereto and made a part hereof, prayed judgment to determine the disposition of the aforesaid chattels, cash, securities, and other assets, and to determine the claims
16 of certain creditors and to authorize and direct conservators to pay to the stockholders of the Moscow Fire Insurance Company, their executors and assigns, outside of Russia, on account of their respective ratable interests in the said chattels, cash, securities, and other assets, such amounts as the Court shall determine therein; that hearings have been conducted before a Referee appointed to hear and determine the issues presented in the said suit in the Supreme Court of New York and proofs of claims of various creditors and the stockholders of the Moscow Fire Insurance Company have been submitted to the said Referee.

6. That on or about November 16, 1933, the Russian State assigned to the complainant, for a valuable consideration, all of its right, title, and interest in and to the cash, securities, and other assets constituting the balance of the aforesaid deposit, and also assigned to the complainant all the right, title, and interest of all Russian nationals in and to the aforesaid cash, securities, and other assets, and since November 16, 1933, the complainant has been

and now is the sole and exclusive owner entitled to the immediate possession of the aforesaid cash, securities, and other assets now in the possession of the defendant.

7. That on August 9, 1934, deponent attended a hearing before Referee James F. Donnelly, appointed by the Supreme Court to hear and determine the issues in the said suit pending in the Supreme Court of the State of New York, and was informed by the Referee that the defendant Bank of New York and Trust Company
17 held in its possession about $1,100,000 in cash, securities, and other assets formerly belonging to the Moscow Fire Insurance Company and that the Referee was about to sign and file a report in the said suit in the Supreme Court of the State of New York recommending for allowance the aforesaid claims of creditors and shareholders of the Moscow Fire Insurance Company, and recommending distribution of the said chattels, cash, securities, and other assets to the said creditors and stockholders.

8. That on August 14, 1934, deponent attended a hearing before the Referee and was informed by the Referee that the Referee would continue to prepare his report, but would not sign it or file it in the Supreme Court prior to August 21, 1934, but that it would be filed at that time recommending distribution of the assets as aforesaid.

9. That upon the filing of the said report and recommendations the parties claimants in the aforesaid suit in the Supreme Court of New York intend to and are about to make a motion in the Supreme Court of New York for an order confirming the report of the said Referee allowing the claims of the parties claimants and ordering distribution of the said securities and assets by the defendant herein.

10. That prior to the institution of this suit, complainant duly demanded of the defendant the said cash, securities, and other assets, together with the interest, dividends, gains, and profits thereof, but the defendant has refused to deliver the same or any part thereof to the complainant.

18 11. That no application has been made to any court or judge for the relief prayed herein or for similar relief.

Wherefore, deponent makes this affidavit in support of an order to show cause why the defendant should not be enjoined and restrained permanently and pending the determination of this suit from paying out or distributing to anyone other than this complainant any part of the said cash, securities, and other assets or the avails thereof.

EDWARD J. ENNIS.

Sworn to before me this 22nd day of August 1934.

[SEAL] ARMAND CHANKALIAN,
Notary Public, New York Co.

Clerk's No. 347, Reg. No. 5C463.
Commission expires March 30, 1935.

19 *Exhibit A to affidavit*

Certified copy of Russian text of a document, a certified translation of which follows attached to affidavit verified August 22, 1934.

CERTIFIED TRANSLATION OF EXHIBIT A, ATTACHED TO AFFIDAVIT, VERIFIED AUGUST 22, 1934

[Copy]

Source: Collection of Decrees and Orders on National Economy (October 25, 1918–March 15, 1919) Volume Two. Published by the Supreme Soviet of National Economy of the Russian Socialist Federated Soviet Republic, Moscow, 1920. Pages 720, 721

Decree of the Soviet of People's Commissars 603. On the organization of the insurance business in the Russian Republic.

(1) Insurance in all its forms, such as: fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, livestock insurance, insurance against failure of crops, etc., is hereby proclaimed as a State monopoly.

NOTE.—Mutual insurance of movable goods and merchandise by the cooperative organizations is conducted on a special basis.

(2) All private insurance companies and organizations
20 (stock and shareholding, also mutual) upon issuance of this decree are subject to liquidation former rural [1] (People's Soviet) and municipal mutual insurance organizations operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Soviet Republic.

(3) For the immediate organization of the insurance business and for the liquidation of insurance institutions which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

NOTE.—The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Federated Soviet Republic.

[1] zemskie.

(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished not later than the first day of April 1919.

21 (5) The Commissariat of Insurance and Fire Prevention, together with all its institutions, is reorganized into the Insurance Department of the Supreme Soviet of National Economy. The matter of fire prevention is transferred to the Supreme Soviet of National Economy.

(6) No Soviet properties and enterprises are subject to insurance.

(7) Life insurance with the State Savings Banks is conducted upon the former basis.

(8) The present decree comes into force on the day of its publication.

(Signed) V. ULYANOV (Lenin),
Chairman of the Soviet of People's Commissars.
V. BONCH-BRUEVICH,
Administrator of Affairs of the Soviet of People's Commissars.

("Izvestiya of the All-Russian Central Executive Committee of Soviet", December 1, 1918, No. 263.)

[Translator's Note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

(Signed) IGNATIUS JAWNEY,
Principal Translator, Department of State, Appointed Translator, January 1928.

Russian.
Tr. IJ : MW : SS.

22 *Exhibit B*

Summons and Complaint in New York Supreme Court suit attached to affidavit verified August 22, 1934.

Supreme Court, New York County

Summons

MOSCOW FIRE INSURANCE COMPANY OF MOSCOW, RUSSIA, AND PAUL Lucke, as sole surviving director of Moscow Fire Insurance Company of Moscow, Russia, and Conservator of its property, plaintiffs

against

BANK OF NEW YORK AND TRUST COMPANY, AS AGENT OR DEPOSITARY of said Moscow Fire Insurance Company of Moscow, Russia, and of the said Paul Lucke as surviving director and conservator; Assecuranz Union von 1865; Carl Otto von Hollitscher and Paul F. Gottlieb, co-partners, transacting business under the firm name and style of Heckscher & Gottlieb; Bertram Ayman Cater; Georg J. Fahrbach; Vladimir A. Miller; Michael Imchanitzky; and Fedor R. Amlong, Carl R. Amlong, Maria G. Arnaud, Alice F. Assmus [and 143 other named defendants], as stockholders of Moscow Fire Insurance Company of Moscow, Russia, on behalf of themselves and all other stockholders similarly situated of said Moscow Fire Insurance Company of Moscow, Russia, defendants

To the Above-Named Defendants:

You are hereby summoned to answer the complaint in this
23 action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the date of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated April 19, 1933.

CAMPBELL & WHIPP,
Attorneys for Plaintiffs, Office & P. O. Address, No. 20 Exchange Place, Borough of Manhattan, New York City.

24 Supreme Court, New York County

Complaint

MOSCOW FIRE INSURANCE COMPANY OF MOSCOW, RUSSIA, AND PAUL Lucke, as sole surviving director of Moscow Fire Insurance Company of Moscow, Russia, and Conservator of its property, plaintiffs

against

BANK OF NEW YORK AND TRUST COMPANY, AS AGENT OR DEPOSITARY OF said Moscow Fire Insurance Company of Moscow, Russia, and of the said Paul Lucke as surviving director and conservator; Assecuranz Union von 1865; Carl Otto von Hollitscher and Paul F. Gottlieb, co-partners, transacting business under the firm name and style of Heckscher & Gottlieb; Bertram Aymar Cater; Georg J. Fahrbach; Vladimir A. Miller; Michael Imchanitzky; and Fedor R. Amlong, Carl R. Amlong, Maria G. Arnaud, Alice F. Assmus [and 143 other named defendants], as stockholders of Moscow Fire Insurance Company of Moscow, Russia, on behalf of themselves and all other stockholders similarly situated of said Moscow Fire Insurance Company of Moscow, Russia, defendants

The plaintiffs above named, by their attorneys, Campbell & Whipp, for their complaint herein allege as follows:

1. The plaintiff Moscow Fire Insurance Company of Mos-
25 cow, Russia, is a corporation of the former Empire of Russia. The defendant Bank of New York and Trust Company is a domestic corporation organized under the Banking Law of the State of New York, with its principal office in the State and County of New York. The defendant Assecuranz Union von 1865, of Cologne, Germany, is a corporation of Germany.

2. By an order of this Court dated and entered August 11, 1931, in a proceeding entitled "Matter of the Application of the People of the State of New York, by James A. Beha, as Superintendent of Insurance, for an order to take possession of the property of Moscow Fire Insurance Company of Moscow, Russia", which order was entered pursuant to a decision of the Court of Appeals, it was provided, among other things, as an alternative to the giving of a surety company bond as therein specified, that the Superintendent of Insurance of the State of New York, as liquidator of the plaintiff Moscow Fire Insurance Company of Moscow, Russia, upon being notified that the said Moscow Fire Insurance Company elected not to furnish the said bond, should release, pay, transfer, and deliver the surplus assets of said Moscow Fire Insurance Company to Bank of New York and Trust Company, of No. 48 Wall Street, New York City, as the agent or depositary of the plaintiff Moscow Fire Insurance Company and of the plaintiff Paul Lucke as surviving director and conservator of the property thereof, upon the filing with the clerk of this court of a written stipulation of the plaintiff Moscow Fire

Insurance Company and of the plaintiff Paul Lucke as such surviving director and conservator, that such surplus assets or fund would not be withdrawn except upon the order of a court of competent jurisdiction.

3. Thereafter the plaintiff Paul Lucke on behalf of the plaintiff Moscow Fire Insurance Company and of himself as such conservator, duly notified the said Superintendent of Insurance as such liquidator aforesaid that said Moscow Fire Insurance Company and he the said conservator elected not to furnish the said bond provided in the said order of August 11, 1931, but, in lieu thereof, elected the alternative provided in said order, to wit: that the said Superintendent of Insurance as said liquidator aforesaid should release, pay, transfer, and deliver the surplus assets of the plaintiff Moscow Fire Insurance Company to the defendant Bank of New York and Trust Company as the agent or depositary of the plaintiff Moscow Fire Insurance Company and of the plaintiff Paul Lucke as surviving director and conservator; and the plaintiffs Moscow Fire Insurance Company and Paul Lucke as its sole surviving director and conservator of its property further duly filed with the Clerk of this Court, as in said order of August 11, 1931, provided, a written stipulation of said plaintiffs that said surplus assets or funds would not be withdrawn except upon the order of a court of competent jurisdiction.

4. On the 18th day of April 1933 the Superintendent of
27 Insurance as liquidator of the plaintiff Moscow Fire Insurance Company released, paid, transferred, and delivered to defendant Bank of New York and Trust Company and to the plaintiff Paul Lucke as such conservator, the following described surplus assets or funds of the plaintiff Moscow Fire Insurance Company,

	Par Value	Approximate Market Value
City of New York Corporate Stock 3½% 1941	$500.00	$325.00
City of New York Corporate Stock 3½% 1949	30,000.00	19,500.00
City of New York Corporate Stock 4% 1955	368,000.00	257,600.00
City of New York Corporate Stock 4% 1956	385,000.00	269,500.00
City of New York Corporate Stock 4% 1955	215,000.00	150,500.00
U. S. of America—2nd Liberty Loan—Converted 4¼% 1942 (Called for redemption Nov. 1927)	80,000.00	80,000.00
Cash	1,899.54	
Total cash and par value of securities	1,080,399.54	

and the defendant Bank of New York and Trust Company now holds the same as the agent or depositary of the plaintiffs.

5. The plaintiff Paul Lucke residing at Paris, France, is the sole surviving member of the board of directors of the plaintiff Moscow Fire Insurance Company, as well as a shareholder in said company. The said plaintiff has been in the service of the said Moscow Fire Insurance Company since 1886; has been manager thereof
28 since 1895, and has been sole managing director since 1907.

Subsequent to the Russian revolution the plaintiff Paul Lucke from outside of Russia has administered the affairs of said company

and conserved its property outside of Russia, and taken proceedings to release and recover its funds and securities in the United States. By reason of the Russian revolution and the decrees and acts of the present Soviet regime of Russia, the plaintiff Moscow Fire Insurance Company is unable, within Russia, the country of its domicile, to perform any of its corporate functions or to carry on its business.

6. The following-named defendants are creditors of the plaintiff Moscow Fire Insurance Company in the amounts indicated: Assecuranz Union von 1865, of Cologne, Germany, balance of account due on contract of reinsurance as adjusted, $6,043.85; Carl Otto von Hollitscher and Paul F. Gottlieb, copartners, transacting business under the firm name and style of Heckscher & Gottlieb, of Berlin, Germany, commissions earned on fire reinsurance treaty business negotiated and managed with the Royal Insurance Company of Liverpool, and other companies, and also for other services as adjusted, $30,000; Betram Aymar Cater, of London, England, services and disbursements as representative of Moscow Fire Insurance Company in connection with negotiations and management of the reinsurance business in London of said Moscow Fire Insurance Company and the closing of its English branch, as adjusted, $21,000; George I. Fahrbach, of Riga, Latvia, for moneys deposited with Moscow Fire Insurance Company, as adjusted, $5,600; Vladimir A. Miller, of Paris, France, legal services and disbursements as Russian counsel in connection with the liquidation of the affairs of the Moscow Fire Insurance Company both in Europe and in the United States covering a period of twelve years, as adjusted, $34,975.82; Michael Imchanitzky, of New York City, legal services and disbursements as Russian counsel from August 11, 1931, in connection with the closing of the liquidation of the U. S. branch of said Moscow Company, as adjusted, $8,000.

7. The total number of shares of the plaintiff Company issued and outstanding at the time of the Russian revolution aggregate 10,000, each share having a par value of two hundred (200) rubles in the former Russian Imperial currency. The defendants other than the defendant Bank of New York and Trust Company and other than the creditor defendants mentioned in the preceding paragraph are or were shareholders of the plaintiff Company who left Russia subsequent to the Russian revolution or the executors, administrators or next of kin outside of Russia of deceased shareholders, or the assigns of such persons. Such defendants are all of such described shareholders, their executors, administrators, or next of kin, known to the plaintiff Paul Lucke or that he has been able to ascertain by diligent inquiry. Such defendants are joined as parties defendants in this action as representative not only of their own interests and of the interests of such deceased shareholders but as representative of the interests of all shareholders of the plaintiff company, their executors, administrators, or next of kin who reside outside of the territorial jurisdiction of the present Russian Soviet regime.

8. The plaintiff Paul Lucke is the sole surviving director of the plaintiff Moscow Fire Insurance Company. As such sole surviving director he is the sole conservator of the Company's property now within the jurisdiction of this Court as heretofore set forth. Because of the uncertainty of human life and because of the nature and manner of the disposition and conservation of such property, it is desirable that co-conservators familiar with the affairs of the Company and with the shareholders thereof, their executors, administrators, and next of kin, should be associated with the plaintiff Paul Lucke in the conservation and disposition of the said property. In the case of another Russian insurance company, the Russian Reinsurance Company, where the surviving directors exist to the number of a quorum, three, of such directors, of which company the plaintiff Paul Lucke is one of such surviving directors, the courts of this State have decided that the solution of the question of the conservation and disposition of the company's property similarly situated, was to direct that such property be delivered to such quorum of directors. The only difference in the case of the instant Company is that here there exists but a single surviving director, the plaintiff Paul Lucke.

31 9. The plaintiff Paul Lucke therefore after conference with many of the defendant shareholders of the plaintiff Company or their executors, administrators or next of kin and with their consent and approval, suggests to the Court the appointment as associate or co-conservators of the said property, with the plaintiff Paul Lucke, the following named persons to act with said plaintiff in the proper conservation and disposition thereof: Percy V. Roepenack, formerly of Moscow, Russia, now residing in Berlin, Germany; Carl R. Amlong, formerly of Moscow Russia, now residing in Berlin, Germany; Carl Otto von Hollitscher, of Berlin, Germany, and of Louis Simmler, of Paris, France. The said Percy V. Roepenack and Carl R. Amlong are representatives of groups of the owners of many shares of the plaintiff Company, and are well and favorably known to the shareholders or their representatives. The said Carl Otto von Hollitscher has long been a member of the firm of Heckscher & Gottlieb, of Berlin, Germany, which firm has for many years acted as the representatives of the plaintiff Company in Germany and in the transaction of much of its business outside of Russia and in the United States, and is familiar with the affairs of the Company and knows and is well and favorably known to those interested therein. The said Louis Simmler is an officer and director of Banque Internationale de Commerce, of Paris, France, and is familiar with the affairs of the Company and knows and is likewise well and favorably known to those interested therein.

32 10. The plaintiff Paul Lucke has rendered long, continuous, and difficult services in the management of the affairs of the plaintiff company and the conservation of its property, for which he has not been paid.

Wherefore, the plaintiffs ask judgment as follows:

1. That there may be determined the disposition of the funds and securities hereinbefore specified.

2. That the claims of the defendant creditors may be determined by the Court and that the plaintiff Paul Lucke as conservator of the plaintiff Company shall be authorized and directed to pay the same as so determined.

3. That the compensation to which the plaintiff Paul Lucke is individually entitled for his services shall be determined, together with his disbursements, including the compensation of plaintiff's attorneys since August 11, 1931, the date of the entry of the order of this court upon the remittitur of the Court of Appeals in the proceedings hereinbefore set forth, and that the plaintiff Paul Lucke as conservator of the plaintiff Company shall be authorized and directed to pay the same as so determined.

4. That there may be designated to act as co-conservators with the plaintiff Paul Lucke in connection with the future disposition
33 and conservation of the property of the plaintiff Moscow Fire Insurance Company, the following named persons, with such powers and authority as the Court shall determine: Percy C. Roepenack, now residing at Berlin, Germany; Carl R. Amlong, now residing at Berlin, Germany; Carl Otto von Hollitscher, of Berlin, Germany; and Louis Simmler, of Paris, France.

5. That the plaintiff Paul Lucke and the co-conservators above named be authorized and directed to pay to the shareholders of the plaintiff Company, their executors, administrators, or next of kin, outside of Russia, on account of their respective ratable interests in the balance of the funds and securities hereinbefore specified, such amount as the Court shall determine.

6. And for such other, further, or different relief as may be determined to be proper, together with the costs, expenses, and disbursements of this action.

CAMPBELL & WHIPP,
Attorneys for Plaintiff,
20 Exchange Place, Borough of Manhattan, New York City, N. Y.

STATE OF NEW YORK,
County of New York, ss:

PAUL LUCKE, being duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action; that the foregoing
34 complaint is true of his own knowledge except as to the matters which are therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

PAUL LUCKE.

Sworn to before me this 19th day of April 1933.

L. D. BATES,
Notary Public, Kings County.

Clerk's No. 479A, Register's No. 4598.
N. Y. Co. Clk's No. 1512, Reg. No. 5B73.
Queens Co. Clk's No. 1317, Reg. No. 5133.
Commission Expires March 30, 1934.

In United States District Court, Southern District of New York

[Title omitted.]

Notice of motion to dismiss bill of complaint

Now comes the defendant Bank of New York and Trust
35 Company, by Emmet, Marvin & Martin, its attorneys, Frederick B. Campbell, of counsel, and gives notice that upon the bill of complaint herein the defendant will move this Court at a stated term for motions thereof on September 4, 1934, at 10:30 a. m., or as soon thereafter as counsel can be heard, for an order dismissing the bill of complaint herein upon the ground that said complaint fails to state facts sufficient to constitute a cause of action, and for such other, further, and different relief to which defendant may be entitled.

New York, N. Y., August 29, 1934.

BANK OF NEW YORK AND TRUST COMPANY,
By EMMET, MARVIN & MARTIN,
Its Attorneys.
FREDERICK B. CAMPBELL,
Of Counsel.

To MARTIN CONBOY, Esq.,
United States Attorney, Attorney for Complainant,
U. S. Courts and P. O. Building,
Borough of Manhattan, New York City.

36 In United States District Court, Southern District of New York

[Title omitted.]

Bill of particulars, dated September 13, 1934

The complainant, in response to the order of this Court on the 12th day of September 1934 providing as follows:

"Ordered, that the complainant herein serve upon the attorneys for the defendant herein a verified bill of particulars, on or before the 13th day of September 1934, stating the particulars of the assignments referred to in paragraph numbered 6 of the bill of complaint herein, stating whether such assignments were oral or in writing, and by whom made on the part of the Russian State, and if in writing, to attach a complete copy of such assignments."

herewith respectfully complies with the said order and states that the assignments referred to in paragraph 6 of the bill of complaint herein are written assignments, photostatic copies of certified copies of which are annexed hereto, described as follows:

37 (1) A written assignment by the State of Russia to the United States, dated August 25, 1933, and signed by Serge Russian Financial Attache and Custodian of the property of the Russian Government in the United States, acting for and on behalf of the State of Russia.

(2) An exchange of letters dated November 16, 1933, between the President of the United States and Maxim Litvinoff, People's Commissar for Foreign Affairs, Union of Soviet Socialist Republics.

Dated, September 13th, 1934.

MARTIN CONBOY,
United States Attorney, Southern District of New York, Attorney for Complainant, Office and P. O. Address, U. S. Courts and P. O. Bldg., Broadway and Park Row, Borough of Manhattan, City of New York.

38 [*Duly sworn to by Edward J. Ennis, jurat omitted in printing.*]

39 *Certified Copy of Assignment, dated August 25, 1933*

Know All Men by These Presents that I, the undersigned, Serge Ughet, as Russian Financial Attache and Custodian of the Property of the Russian Government in the United States, acting for and on behalf of the State of Russia, for and in consideration of good and valuable considerations by the United States of America to the State of Russia paid, the receipt of which is hereby acknowledged, have assigned, transferred, set over, and delivered and by these presents do assign, transfer, set over, and deliver unto the United States of America, its successors and assigns, to its and their own proper use and benefit forever, all property, of whatsoever nature and description, in the United States belonging to the State of Russia, together with all claims and demands of every nature and description, whether legal or equitable, existing in favor of the State of Russia in the

United States, or against any person, firm, or corporation in the United States, or arising out of any contract or agreement or transaction in the United States or otherwise, including therein among others the following property and claims:

(1) Claim for approximately $4,976,722.78 with interest for a balance of the Russian Government with the Guaranty Trust Company of New York.

(2) Claim for approximately $15,000.00 against the Guaranty Trust Company of New York arising out of a contract with the Morton Truck and Tractor Company.

(3) Claim for approximately $46,584.18 balance on deposit
40 with the New York Trust Company on account of a bond issue of the Vladikavkas Railway Company.

(4) Claim for approximately $11,680.00 against the said New York Trust Company on account of a balance of a payment made by the Russian Financial Attache on or about September 10, 1918, in connection with the same bonds.

(5) Claim for approximately $140,000.00 against the National City Bank of New York on account of a payment made to the said bank regarding certain shoes ordered for working men and employees of the Vladikavkas Railway Company.

(6) Claim for approximately $1,050,000.00 with interest against the Curtiss Aeroplane & Motor Company.

(7) Claim for approximately $384,118.07 with interest for moneys due from the Canadian Pacific Railway Company under contracts with the Russian Government.

(8) Claim for approximately $1,412,532.35 with interest on account of the amounts due by the United States Shipping Board for the requisition of Hulls Nos. 6 and 7 of the Russian Volunteer Fleet, action in connection with which is now pending in the United States Court of Claims No. 69 A.

(9) Claim for the sum of approximately $218,750.00 originally deposited with the Guaranty Trust Company as escrow money on Hull No. 6 under the contract for the purchase of said hull by the said Russian Volunteer Fleet.

(10) Claim for the sum of approximately $23,643.75 on ac-
41 count of a balance due by the United States Shipping Board in connection with the charter of certain steamers of the said Russian Volunteer Fleet.

The foregoing list of claims is not intended to be exclusive. It is the intention of this assignment to transfer to the United States of America all property, rights, and claims having a situs in the United States formerly belonging to either the Imperial Russian Government or the Provisional Russian Government.

Excluding from this assignment, however, the right, title, and interest of the said State of Russian in and to the claim, demand, or

cause of action involved in the pending suit in equity in the United States District Court for the Southern District of New York, No. E 46–6, entitled "State of Russia, plaintiff, against Bankers Trust Company and National City Bank of New York, defendants."

IN WITNESS WHEREOF the said Serge Ughet as Russian Financial Attaché and Custodian of the property of the Russian Government in the United States, acting for and on behalf of the State of Russia, has hereunto set his hand and seal this 25th day of August, 1933.

[SEAL] (Signed) SERGE UGHET,

As Russian Financial Attaché and Custodian of the property of the Russian Government in the United States, acting for and on behalf of the State of Russia.

FINANCIAL ATTACHÉ TO THE RUSSIAN EMBASSY IN WASHINGTON.

42 *Exchange of Letters, dated November 16, 1933*

WASHINGTON, *November 16, 1933.*

MY DEAR MR. PRESIDENT: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

43

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its

nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOV,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

MR. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

THE WHITE HOUSE,
Washington, November 16, 1933.

MY DEAR MR. LITVINOV: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

44 "The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any

amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

Mr. MAXIM M. LITVINOV,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

46 In United States District Court, Southern District of New York

[Title omitted.]

Bill of particulars, dated October 1, 1934

The complaint, in response to the order of this Court of the 1st day of October 1934, providing as follows:

"Ordered, that the complainant herein serve forthwith upon the defendant's solicitors a bill of particulars of the allegations of the bill of complaint, in the following respects:

"1. Setting forth a copy (which need not be certified) of the order referred to in paragraph 5 of the complaint as 'an order of the Supreme Court of New York, New York County.'

"2. Setting forth copies of the 'decrees of the Russian State' and the date or dates thereof, referred to in paragraph 4 of the complaint; provided that such decrees as furnished on this bill of
47 particulars be without prejudice to the complainant herein, offering as part of its proof, in the event of a trial, any other decrees upon giving reasonable notice to the solicitors for the defendant.

"3. Stating what government or regime in or of Russia is intended to be referred to by the term 'Russian State' as contained in paragraphs 4 and 6, respectively, of the complaint."

herewith respectfully complies with the said order and states:

(1) That the order of the Supreme Court of New York, New York County, referred to in paragraph 5 of the complaint is an order dated August 11, 1931, a copy of which is attached hereto.

(2) That the decrees of the Russian State referred to in paragraph 4 of the complaint are decrees published April 20, 1918, December 1, 1918, March 7, 1919, and March 5, 1921, copies of which and translations of which are attached hereto, and any other decrees which the complainant may offer as part of its proof in the event of a trial upon giving reasonable notice to the solicitors for the defendant.

(3) That the Government or Regime in or of Russia intended to be referred to by the term "Russian State" in paragraphs 4 and 6 of the complaint is the Government which has been recog-
48 nized by the United States by its political departments as having been sovereign in Russia since 1917.

Dated, October 1, 1934.

MARTIN CONBOY,
United States Attorney, Southern District of New York, Attorney for Complainant, Office and P. O. Address, U. S. Courts and P. O. Building, Broadway and Park Row. Borough of Manhattan, City of New York.

49 [*Duly sworn to by Edward J. Ennis, jurat omitted in printing.*]

50 *Exhibit A*

Copy of the order of the Supreme Court of New York, New York County, dated August 11, 1931, attached to Bill of Particulars, dated October 1, 1934.

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the County Court House in the Borough of Manhattan, City of New York, on the 11th day of August 1931.

Present: Honorable Edward S. Dore, Justice.

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE OF New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of Moscow Fire Insurance Company, of Moscow, Russia, and the interests of its policyholders, creditors, stockholders, and the public

Order upon Remittitur of the Court of Appeals

The above-named Moscow Fire Insurance Company, of Mos-
51 cow, Russia, having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated May 29, 1930, modifying and as modified affirming an order of Special Term, Part I, of the Supreme Court, New York County, dated September 10, 1929; and the said appeal having been argued in the Court of Appeals and the Court of Appeals having ordered and adjudged that the order of the Appellate Division and that of Special Term, be reversed and order entered dissolving the injunction and directing the transfer or the deposit of the surplus in accordance with the opinion and having remitted the record and proceedings in said court to the Supreme Court there to be proceeded upon according to law; and the remittitur of the Court of Appeals dated February 11, 1931, having been filed in the office of the Clerk of the County of New York on the 23rd day of July 1931; and the

above-named Company having moved for an order making the judgment of the Court of Appeals the judgment of the Supreme Court;

Upon reading the order of remittitur certificate of the Court of Appeals dated February 11, 1931, and heretofore filed herein, and upon reading and filing the notice of motion herein dated July 23d, 1931, and the affidavits of Frederick B. Campbell verified July 23d, 1931, of Paul Lucke verified June 22d, 1931, of Nicholas Goutchkoff verified June 23d, 1931, and of Michael Imchanitzky verified July 23d, 1931, and due proof of service thereof in support of said motion and the answering affidavit of John M. Downes, verified July 30, 1931, and the replying affidavit of Frederick B. Campbell verified August 1, 1931.

52 Now, upon motion of Campbell & Whipp, attorneys for the above named Moscow Fire Insurance Company, of Moscow, Russia, it is

Ordered, adjudged, and decreed:

(1) That the order and judgment of the Court of Appeals dated February 11, 1931, be made the order and judgment of this court.

(2) That the injunction contained in the liquidation order herein, dated and entered August 8, 1925, as resettled by order dated and entered September 11, 1925, be forthwith vacated and dissolved.

(3) That all claims filed with the Superintendent of Insurance before the date of this order be determined within the instant liquidation proceeding according to law.

(4) That the Superintendent of Insurance, as Liquidator of Moscow Fire Insurance Company, of Moscow, Russia, is hereby directed to retain in his possession for four (4) months subsequent to the date of this order, the surplus U. S. funds of the above named Company, subject to any further order of the court within such period of time as to any part of such funds; and upon the expiration of such period of four (4) months, after making reservation of funds sufficient to satisfy (a) his proper charges, expenses, and taxes, (b) an amount sufficient to satisfy all claims with interest filed with

53 said Superintendent of Insurance before the date of this order, and (c) claims upon which any attachments shall be served upon said Superintendent of Insurance during said four (4) months in actions at law against the Company, to release, pay, transfer, and deliver the surplus assets of Moscow Fire Insurance Company, of Moscow, Russia, to Paul Lucke, as sole surviving director of said Company and conservator of its property, upon condition that he file with the clerk of this court a duly approved surety company bond in a sum equal to the value of the assets so to be released, paid, transferred, and delivered, such bond to be in the following form:

Know all men by these presents, that Moscow Fire Insurance Company, of Moscow, Russia, and Paul Lucke, of Paris, France, individually and as sole surviving director of said Moscow Fire

Insurance Company and conservator of its property, as principals, and (insert name of surety company) a corporation, having an office at No. in the City and State of New York, as surety, are held and firmly bound unto the People of the State of New York, as obligee, in the sum of Dollars ($) lawful money of the United States, to be paid to the said People, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed, and delivered this day of , 1931.

54 Whereas, the Court of Appeals of the State of New York has directed the delivery by the Superintendent of Insurance of the State of New York of assets of the above-named Company to the surviving director of the board of directors of such Company upon the filing by him of a surety company bond to the People of the State in a sum equal to the value of the assets so delivered, with a condition to the effect that such director shall faithfully apply such assets to the use of the corporation, its creditors and shareholders, the bond to be enforceable, in case of breach of the condition, by the corporation or by any creditor affected thereby:

Now, therefore, the condition of this obligation is such that if the above bounden Moscow Fire Insurance Company, of Moscow, and Paul Lucke, individually and as sole surviving director of said Moscow Fire Insurance Company and conservator of its property, shall faithfully apply the assets of the Moscow Fire Insurance Company, of Moscow, Russia, to be released and delivered by the Superintendent of Insurance of the State of New York to said Paul Lucke to the use of the said Moscow Fire Insurance Company, of Moscow, Russia, its creditors and shareholders, then this obligation to be null and void, otherwise to remain in full force and effect, and in case of breach of the condition, to be enforceable by the Moscow Fire Insurance Company, of Moscow, Russia, or by any creditor or shareholder thereof affected thereby.

55 In witness whereof the principals and the surety have caused this bond to be duly signed and sealed the day and year first above written.

MOSCOW FIRE INSURANCE COMPANY, OF MOSCOW, RUSSIA,
By (PAUL LUCKE), *Surviving Director and Conservator.*
(PAUL LUCKE),
Individually and as surviving Director and Conservator.
By (Surety Company), *Surety.*

(Acknowledgments and authority of attorneys in fact for surety to follow here.)

(5) As an alternative to the giving of the bond hereinabove specified, the Superintendent of Insurance, upon being notified that the said Moscow Fire Insurance Company elects not to furnish the said bond, is hereby directed to release, pay, transfer, and deliver

the said surplus assets to Bank of New York and Trust Company, of No. 48 Wall Street, New York City, as the agent or depositary of said Moscow Fire Insurance Company, of Moscow, Russia, and of the said Paul Lucke as surviving director and conservator, upon the filing with the clerk of this court of a written stipulation of said Moscow Fire Insurance Company and of said Paul Lucke as such surviving director and conservator of said Company, that such surplus assets or fund will not be withdrawn except upon the order of a court of competent jurisdiction.

56 . (6) The Superintendent of Insurance is hereby directed to make and file within thirty (30) days from the date of this order an account of his proceedings as liquidator of Moscow Fire Insurance Company, of Moscow, Russia, from March 7th, 1929, down to the date of this order.

(7) Any party to this proceeding may hereafter apply at the foot of this decree for such further relief as he may be advised.

Enter,

E. S. D., *J. S. C.*

Exhibit B

Certified copies of Russian Text of Decrees, published April 20, 1918, December 1, 1918, March 7, 1919, and March 5, 1921, attached to Bill of Particulars dated October 1, 1934.

57 *Certified translation of Russian decree, published April 20, 1918*

Source: Sobranie Uzakonenii I Pasporyazhenii Rabochego I Krestyanskogo Pravitelstva (Collection of Laws and Orders of the Worker's and Peasant's Government) 1917–1918, Nos. 1–80, Moscow, 1919

[Translation]

Decree of the Soviet of People's Commissars

420. Regarding the registration of stock certificates, bonds, and other interest-bearing securities.

(1) In pursuance of the decree of December 29, 1917, on the discontinuance of payments on coupons and dividends (Sobranie Uzakonenii I Rasporyazhenii Rabochego I Krestyanskogo Pravitelstva—Collection of Laws and Orders of the Worker's and Peasant's Government—No. 13, Article 185), the system of anonymous stock certificates and all kinds of other interest-bearing securities is abolished and henceforth only name-bearing interest-bearing securities shall be valid.

NOTE.—Those state interest-bearing securities to which, by special resolution of the Government, circulation has been accorded on a

par with paper money, are not subject to the provisions of the present clause.

(2) In accordance therewith, there shall be introduced an
58 obligatory registration of stock certificates, bonds, and all kinds of other interest-bearing securities, Russian and foreign, belonging not only to citizens of the Russian Soviet Republic, but also to foreign citizens residing in its boundaries.

(3) Each owner or holder of securities indicated in clause 1 must present them for registration in one of the offices or branches of the People's (State) Bank of the Russian Soviet Republic.

(4) On the securities presented in accordance with the preceding clause there shall be denoted by the State Bank, under its seal, the Christian name, patronymic, surname, and address of their owners, which shall likewise be entered in the register of negotiable instruments.

(5) All branches of the People's (State) Bank and the State Savings Bank, all state and public institutions, as well as nonnationalized credit institutions, in which stock certificates and interest-bearing securities are kept for safe keeping, for management, in pledge, as security, etc., must effect the registration of securities there located, recognizing as the owners thereof those physical and juridical persons in whose behalf and in whose name they are entered. All this information relating to registration must be centered in the local branches of the People's (State) Bank.

NOTE.—Interest-bearing securities, found in safe deposit boxes, are considered as the property of the renters of the safe deposit
59 boxes, if, in the safe deposit box itself, there is not found evidence to the contrary.

(6) The prohibition of the disposition of stock certificates, bonds, and other interest-bearing securities set forth in the decree of December 29, 1917, shall retain its validity until the issuance of a law concerning the introduction of a system permitting the disposition of stock certificates and other interest-bearing securities.

Only owners of stock certificates and other interest-bearing securities, who have correctly and on time registered them, shall have a right to compensation, in the event of the nationalization of enterprises, in those amounts and on those conditions which shall be determined by the law regarding nationalization.

Likewise, only such owners of stock certificates shall have a right to a dividend after the payment thereof, suspended by the law of December 29, 1917, shall have been authorized.

(7) The presentation of stock certificates and other interest-bearing securities on hand must be preceded by the filing of applications. The form of these applications, the date of their filing, and further regulations pertaining to the presentation of stock certificates and

to their registration, shall be determined by the People's Commissariat for Finance and shall be made known to the public.

(8) All stock certificates with respect to which the applications, indicated in clause 7, will not have been filed in time, shall be subject to become, without recompense, state property.

NOTE.—Owners and holders of stock certificates who have not carried out the instructions of the present decree shall be subject to imprisonment for a term of not less than one year.

Those guilty of performing fictitious transactions for the purpose of evading this decree shall be punished by imprisonment for a term of not less than two years.

(9) Annulled securities and stock certificates of confiscated enterprises are also subject to registration in order to guaranty the just interests of the holders.

(10) The registration of Russian interest-bearing securities, bonds and stock certificates, private, public, and state, which are abroad, shall be effected regardless of whether they belong to Russian or foreign citizens; and for their registration it shall be obligatory to present them in the original to persons or institutions who shall be empowered by the appropriate diplomatic representatives of Russia abroad to keep state registers in the corresponding appropriate states and during periods which shall be established by the aforesaid diplomatic representatives.

Signed: President of the Soviet of People's Commissars, VI. Ulyanov (Lenin). For the People's Commissar of Finance, I. Gukovski. President of the Supreme Soviet of National Economy, A. I. Rykov. In charge of the Affairs of the Soviet of People's Commissars, VI. Bonch-Bruevich. April 18/5, 1918.

Published in Izvestiya of the All-Russian Central Executive Committee of Soviets, April 20/7, 1918, No. 78.

Translator's note: I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

IGNATIUS JAWNEY,
Principal Translator, Department of State.

Appointed Translator January 1928.

Tr:IJ:MA:SS 9/27

Certified translation of Russian decree, published December 1, 1918

Source: Collection of Decrees and Orders on National Economy (October 25, 1918–March 15, 1919) Volume Two. Published by the Supreme Soviet of National Economy of the Russian Socialist Federated Soviet Republic. Moscow, 1920. Pages 720, 721.

Decree of the Soviet of People's Commissars

603. On the organization of the insurance business in the Russian Republic.

(1) Insurance in all its forms, such as: fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, livestock insurance, insurance against failure of crops, etc., is hereby proclaimed as a State monopoly.

NOTE.—Mutual insurance of movable goods and merchandise by the cooperative organizations is conducted on a special basis.

(2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree are subject to liquidation; former rural [1] (People's Soviet) and municipal mutual insurance organizations operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Soviet Republic.

(3) For the immediate organization of the insurance business and for the liquidation of parts of insurance institutions, which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

NOTE.—The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Federated Soviet Republic.

(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished not later than the first day of April 1919.

(5) The Commissariat of Insurance and Fire Prevention, together with all its institutions, is reorganized into the Insurance Department of the Supreme Soviet of National Economy. The matter of fire prevention is tranasferred to the Supreme Soviet of National Economy.

(6) No Soviet properties and enterprises are subject to insurance.

[1] semskie.

(7) Life insurance with the State Savings Banks is conducted upon the former basis.

(8) The present decree comes into force on the day of its publication.

(Signed) V. LYANOV (Lenin),
Chairman of the Soviet of People's Commissars.
V. BONCH-BRUEVICH,
Administrator of Affairs of the Soviet of People's Commissars.

("IZVESTIYA of the All-Russian Central Executive Committee of Soviets", December 1, 1918, No. 263.)

64 [Translator's Note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

IGNATIUS JAWNEY,
Principal Translator, Department of State.
Appointed Translator, January 1928.
Russian.
Tr.IJ:MW:SS.

Certified translation of Russian decree, published March 7, 1919

[Translation]

Source: Sobranie Uzakonenii I Rasporyazhenii Rabochego I Krestyanskogo Pravitelstva (Collection of Laws and Orders of the Worker's and Peasant's Government), 1919, Pages 133–134

Decree of the Soviet of People's Commissars

108. On the liquidation of obligations of state enterprises.

In view of the fact that all state (nationalized, sequestrated, former governmental, etc.) enterprises, on the basis of the decree of the Soviet of People's Commissars regarding the financing of
65 enterprises (Collection of Laws, 1919, No. 10–11, Art. 107), beginning with March 1 of this year, are being supplied with necessary funds exclusively through separate budget financing, the Soviet of People's Commissars decrees:

(1) Stock-certificates and shares of joint stock companies and partnerships, whose enterprises have been either nationalized or sequestrated, are annulled even though such enterprises have not yet been placed under the direction of governmental administrations and have remained in the use of former owners without payment of rent.

(2) State enterprises are freed from the payment of all debts to private persons and enterprises which have arisen prior to the nationalization of these enterprises, including payments on bond loans, with the exception only of wages due to their workers and employees.

NOTE.—Former governmental plants which, as the result of the October revolution, have been placed at the disposition of the Work-

er's-Peasant's Government, are freed from the payment of those debts only which have arisen before October 25, 1917.

(3) The debts of State enterprises due other State enterprises and institutions, the People's Bank of the R. S. F. S. R. and all former private credit institutions which have amalgamated with it, and also all kinds of State and local taxes in arrears, are annulled and are not subject to collection.

66 (4) Cash and capital belonging to State enterprises, in credit institutions, shall be taken from their administration and shall be transferred to the income of the Treasury, with the exception of sums paid out to an enterprise under budget estimates for the first half year of 1919, and with the exception of construction credits for 1918.

(5) Obligations of third persons with respect to State enterprises retain their validity, and the appropriate head office, center, or section of the Supreme Soviet of National Economy, shall be given the right to repudiate agreements concluded by a former owner of an enterprise before its nationalization or before its actual transfer to the direction of a governmental administration.

(6) A detailed instruction concerning the putting into effect of the present decree shall be completed within a week's time by the Supreme Soviet of National Economy together with the People's Commissariats of State Control and of Finance.

Signed: President of the Soviet of People's Commissars, V. Ulyanov (Lenin). In charge of the affairs of the Soviet of People's Commissars, V. Bonch-Bruevich. Secretary of the Soviet of People's Commissars, L. Fotieva.

March 4, 1919.

Published in Izvestiya of the Central Executive Committee, March 7, 1919. No. 52.

67 Translator's Note: I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

IGNATIUS JAWNEY,
Principal Translator, Department of State.

Appointed Translator, January 1928.

Tr: IJ: AT: SS.

30005—35——3

Certified translation of Russian decree, published March 5, 1921

Source: Sobranie Uzakonenii I Rasporyazhenii Rabochego I Krestyanskogo Pravietelstva (Collection of Decrees and Orders of the Worker's and Peasant's Government). Publication of the People's Commissariat for Justice, March 18, 1921, No. 18, Article 111, Page 106

[Translation]

111. Regarding the confiscation of all movable property of citizens who have fled beyond the borders of the Republic or who have been in hiding up to the present time.

The Soviet of People's Commissars has resolved the following as supplementary to its decree concerning property without an owner (Collection of Decrees and Orders, 1920, No. 87, Article 442):

1. All movable property, regardless of what it consisted of or where it was found, of citizens who have fled beyond the borders of the Republic or of citizens who have been in hiding up to the present time, is declared the property of the R. S. F. S. R.

2. Of said property all articles of art or antiquity which possess a particular artistic or historic value shall be given over by order of the People's Commissariat for Public Instruction to museums, universities, or other educational institutions; all the remaining property of such citizens shall be converted into a merchandise fund of the Republic and shall be placed at the disposition of the People's Commissariat for Foreign Trade and other People's Commissariats in accordance with their respective jurisdictions.

3. In execution of the present resolution a detailed instruction shall be issued to the People's Commissariats for Public Instruction and for Foreign Trade.

(Signed) V. ULYANOV (Lenin),
President of the Soviet of People's Commissars.
N. GORBUNOV,
Administrator of Affairs of the Soviet of People's Commissars.
L. FOTIEVA,
Secretary of the Soviet of People's Commissars.

69 NOVEMBER 19, 1920.

Published in Izvestiya of the All Russian Central Executive Committee of Soviets, No. 49, March 5, 1921.

[Translator's Note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

IGNATIUS JAWNEY,
Principal Translator, Department of State.

Appointed Translator, January 1928.
Russian.
Tr. IJ.

70 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit of John C. Vedder, in opposition to complainant's motion for injunction pendente lite

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

JOHN C. VEDDER, being first duly sworn, deposes and says:

I am a Vice President of the defendant Bank of New York and Trust Company. On August 23, 1934, there was served upon the Trust Company the subpoena and bill of complaint herein, accompanied by an order to show cause why an injunction should not be granted during the pendency of this suit enjoining the Trust Company from transferring or paying out funds which it now holds as agent or depositary of Moscow Fire Insurance Company and of Paul Lucke, as the conservator of the property of said Moscow Fire Insurance Company. Included in the order to show
71 cause was a provision restraining the Trust Company from transferring or paying out said funds prior to the determination of such motion for injunction.

On April 18, 1933, the defendant Trust Company received from George S. Van Schaick, Superintendent of Insurance of the State of New York, pursuant to an order of the Supreme Court of the State of New York, dated August 11, 1931, certain securities and cash in the par value of upwards of one million dollars as set forth in paragraph "5" of the complaint. Such funds were so delivered to the Trust Company by the N. Y. Superintendent of Insurance and accepted by the Trust Company as agent or depositary of Moscow Fire Insurance Company, of Moscow, Russia, and of Paul Lucke, as surviving director and conservator of said Company, pursuant to the stipulation of said Moscow Fire Insurance Company

and of said Paul Lucke, as such surviving director and conservator of said Company, to the effect that said funds would not be withdrawn except upon the order of a court of competent jurisdiction. A copy of the Trust Company's receipt for such funds is hereto attached and made a part hereof, marked Exhibit 1. A copy of the said order of the N. Y. Supreme Court, dated August 11, 1931, is attached hereto and made a part hereof, marked Exhibit 2. The U. S. securities mentioned in said receipt have been redeemed and under an order of the N. Y. Supreme Court the N. Y. City securities mentioned in such receipt have been sold. The Trust Company now holds said funds, except that during the progress of the suit in the
72 N. Y. Supreme Court hereinafter mentioned, and prior to August 22, 1934, the Trust Company made certain payments therefrom pursuant to orders of the N. Y. Supreme Court.

Shortly after the receipt of such funds, the Trust Company was served on April 21, 1933, with a summons and complaint in a suit in the Supreme Court of the State of New York for the County of New York, in which suit the plaintiffs were Moscow Fire Insurance Company and Paul Lucke as sole surviving director of said Moscow Company and conservator of its property, and the defendants were the Trust Company as agent or depositary of said Moscow Company and of said Paul Lucke as said surviving director and conservator, and numerous other party defendants. Such suit sought the judgment of the court as to the disposition of the funds so received by the Trust Company as hereinbefore stated. A copy of the summons and complaint in such suit is attached hereto and made a part hereof, marked "Exhibit 3." In such suit the Trust Company duly appeared by its attorneys, Messrs. Emmet, Marvin & Martin. On August 22, 1934, the Trust Company was served with a copy of the judgment in such suit, a copy of which judgment is attached hereto and made a part hereof, marked "Exhibit 4." On August 18, 1934, the Trust Company received from the U. S. District Attorney a letter demanding surrender of the fund, a copy of which letter is attached hereto and made a part hereof, marked "Exhibit 5."

The judgment of August 22, 1934, awards a considerable part
73 of the funds so deposited with the Trust Company as hereinbefore stated to many different parties therein mentioned, and provides that the balance of such fund shall be held subject to the further order of the N. Y. Supreme Court. Certain of the judgment-creditors so named in such judgment have demanded of the Trust Company payment of the amounts which they have been respectively so awarded, and four judgment-creditors so named have issued executions thereon to the Sheriff of New York County and notices of levy have been served upon the Trust Company. The Trust Company has been further served with several warrants of attachment by alleged creditors of judgment-creditors specified

in said judgment and with an order for the examination of the Trust Company by a judgment-creditor of a judgment-creditor named in said judgment.

JOHN C. VEDDER.

Sworn to before me this 12th day of September 1934.

B. Koechel,
B. KOECHEL,
Notary Public.

[SEAL]

Kings Co. Clk's No. 32, Reg. No. 6029.
N. Y. Co. Clk's No. 70, Reg. No. 6K40.
Commission expires March 30, 1936.

74 *Exhibit 1, attached to affidavit of John C. Vedder*

State of New York

Insurance Department

Bureau of Liquidations, Conservations, and Rehabilitations

80 Centre Street, New York

Supreme Court, New York County

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE OF New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the Moscow Fire Insurance Company of Moscow, Russia, and the interests of its policyholders, creditors, stockholders, and the public

Received from George S. Van Schaick, Superintendent of Insurance of the State of New York, as liquidator of the United
75 States Branch of Moscow Fire Insurance Company of Moscow, Russia, the cash and securities hereinafter described and specified:

	Par value
City of New York Corporate Stock 3½% 1941	$500.00
" " " " " " 3½% 1949	30,000.00
" " " " " " 4% 1955	368,000.00
" " " " " " 4% 1956	385,000.00
" " " " " " 4% 1955	215,000.00
U. S. of America 2nd Liberty Loan—Converted, 4¼% 1942 (Called for redemption Nov. 1927.)	80,000.00
Check payable to Bank of New York and Trust Company, as agent or depositary of Moscow Fire Insurance Company of Moscow, Russia	1,899.54
Total Cash and Securities	1,080,399.54

The assets hereinbefore specified are received and accepted by the undersigned, Bank of New York and Trust Company, as agent or depositary of the said Moscow Fire Insurance Company of Mos-

cow, Russia, and of Paul Lucke as surviving director and conservator of said company by virtue of and pursuant to the stipulation contained in an instrument dated July 20th, 1931, executed on behalf of Moscow Fire Insurance Company by Paul Lucke, as its surviving director and conservator, and by Paul Lucke, individually, and as surviving director and conservator, which said instrument also designated the Bank of New York and Trust Company, of No. 48 Wall Street, New York City, as the agent or depositary, to receive from
the Superintendent of Insurance, of the State of New York,
76 as liquidator aforesaid, the delivery of the surplus assets of
said company under the conditions provided in the orders hereinafter mentioned, which said stipulation was made in accordance with and pursuant to an order of the Court of Appeals of the State of New York, dated and filed in the office of the Clerk of said Court on February 10th, 1931, and an order of the Supreme Court, New York County, dated and entered August 11th, 1931, making the said order of the Court of Appeals the order of said Supreme Court, in and by which said orders it was provided that delivery of the surplus assets of Moscow Fire Insurance Company, in possession of the Superintendent of Insurance of the State of New York, as liquidator, may be made to a trust company in the City of New York, as agent or depositary, upon the stipulation of said Moscow Fire Insurance Company and Paul Lucke, its conservator, designated in said orders, that the fund, consisting of said assets, will not be withdrawn except upon the order of a court of competent jurisdiction.

Dated, New York, N. Y., April 18th, 1933.

[SEAL] BANK OF NEW YORK AND TRUST COMPANY,

By J. C. VEDDER,

Vice-President, as Agent or Depositary of Moscow Fire Insurance Company, and of Paul Lucke, as surviving director and conservator of said company.

P. LUCKE,

As surviving director and conservator of Moscow Fire Insurance Company.

77 *Exhibit 2*

Copy of Order of Supreme Court of New York, New York County, dated August 11, 1931, attached to affidavit of John C. Vedder.

(Printed hereinbefore as Exhibit A attached to Bill of Particulars dated October 1, 1934.)

Exhibit 3, attached to affidavit of John C. Vedder

Summons and Complaint in a suit entitled Moscow Fire Insurance Company of Moscow, Russia, and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and Conservator of

its property, et al. against Bank of New York and Trust Company as agent or depository of said Moscow Fire Insurance Company of Moscow, Russia, and of the said Paul Lucke as surviving director and conservator [as hereinbefore printed as Exhibit B attached to affidavit in support of Order to Show Cause dated August 22, 1934] commenced in Supreme Court, New York County on or about April 19, 1933.

78 *Exhibit 4, attached to affidavit of John C. Vedder*

Supreme Court, New York County

Moscow Fire Insurance Company, of Moscow, Russia, and Paul Lucke, as sole surviving director of Moscow Fire Insurance Company of Moscow, Russia, and Conservator of its property, plaintiffs

against

Bank of New York and Trust Company, as Agent or Depositary of said Moscow Fire Insurance Company of Moscow, Russia, and of the said Paul Lucke as surviving director and conservator; Assecuranz Union von 1865; Carol Otto von Hollitscher and Paul F. Gottlieb, co-partners, transacting business under the firm name and style of Heckscher & Gottlieb; Bertram Aymar Cater; Georg J. Fahrbach; Vladimir A. Miller; Michael Imchanitzky; and Fedor R. Amlong, Carl R. Amlong, Maria G. Arnaud, Alice F. Assmus [and 143 other named defendants], as stockholders of Moscow Fire Insurance Company, of Moscow, Russia, on behalf of themselves and all other stockholders similarly situated of said Moscow Fire Insurance Company, of Moscow, Russia defendants

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Samuel E. Morro, Marie Lobkoschebounine, Bona Wiktorja Kruger and Vladimir Velichko, in behalf of themselves and all other stockholders of Moscow Fire Insurance Company of Moscow, Russia, plaintiffs

against

Moscow Fire Insurance Company, of Moscow, Russia, Paul Lucke and Bank of New York and Trust Company, as agent and depositary of said Moscow Fire Insurance Company of Moscow, Russia, and of said Paul Lucke, defendants
County Clerk's Index No. 15074–1933.
Judgment.

79 The first of the above-entitled actions having been referred by an order duly made and entered therein the 13th day of October 1933, to James F. Donnelly, Esq., as Referee to hear and

determine all the issues therein and said above-entitled actions having been thereafter consolidated by an order duly made and entered herein on the 18th day of April 1934, wherein all the issues in both of said above-entitled actions were referred to the said James F. Donnelly, Esq., as Referee to hear and determine the same, and after trial had on due notice to all the parties, said Referee having on the 22nd day of August 1934, duly made and filed his report herein stating the findings of fact herein and conclusions of law thereon, and directing judgment as hereinafter stated, and on said trial Campbell & Whipp, Esquires, having appeared as attorneys for Moscow Fire Insurance Company and Paul Lucke, as sole surviving director of Moscow Fire Insurance Company and conservator of its property, plaintiffs in the first of said actions and defendants in the second of said actions, and Borris M. Komar, Esquire, having appeared for Samuel E. Mooro et al., plaintiffs in the second of said actions, and Emmet, Marvin & Martin, Esquires, having appeared as attorneys for the defendant Bank of New York and Trust Company, as agent or depositary of Moscow Fire Insurance Company and of the said Paul Lucke, as surviving director and conservator, and Osmond K. Fraenkel, Esquire, having appeared as attorney for defendants Vladimir Kentman, Andrei D. Pavlov, and others, and White
80 & Case, Esquires, having appeared as attorneys for the defendant Olga Hoppe, and Henry Breckenridge, Esquire, having appeared as attorney for the defendants Eugenie M. Mikhailoff and Valentina M. Barthel-Mikhailoff Schott, and Samson Selig, Esquire, having appeared as attorney for the defendants Count Dmitri Ivanovitch Tolstoi and Boris Tchitcherin and John Steggall Sawyer, as executors under the Last Will and Testament of Elena V. Tchitcherina, deceased, and Englehard, Pollak, Pitcher, Stern and Clarke, Esquires, having appeared as attorneys for the defendants Brandforsikrings Selskabet, Norge-Drammen, Holger Zahle, as assignee of Forsakringsaktiebolaget Skandia and Gerson Jakubovic, Meier Jakubovic, Liba Jakubovic, Chaja-Elka Jakubovic, Riva Jakubovic, Amalia Jakubovic and Scheine Joffe nee Jakubovic, and Cabell, Ignatius & Lown, Esquires, having appeared as attorneys for the defendants Heckscher & Gottlieb, Assecuranz Union Von 1865 and Vladimir A. Miller, and Alfred L. Green, Esquire, having appeared as attorney for the defendant Michael M. Imchanitzsky, and Chester W. Davis, Esquire, having appeared as attorney for the claimants Robert Natus and Lorentz & Krusche;

Now, on motion of Campbell & Whipp, attorneys for the said plaintiffs Moscow Fire Insurance Company and Paul Lucke, as sole surviving director of Moscow Fire Insurance Company and conservator of its property;

81 It is adjudged:

1. The Moscow Fire Insurance Company is justly indebted to George I. Fahrbach, of Riga, Latvia, in the sum of Five thousand six hundred dollars ($5,600) on balance of his account with said company.

2. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator are hereby directed to pay to the said George T. Fahrbach in satisfaction of the aforesaid indebtedness the sum of Five thousand six hundred dollars ($5,600).

3. The said Moscow Fire Insurance Company is justly indebted to Brandforsikrings Selskabet, Norge-Drammen, in the sum of Ten thousand five hundred dollars ($10,500) as of April 13, 1934, on balance of account.

4. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator
82 are hereby directed to pay to said Brandforsikrings Selskabet, Norge, Drammen, or to their attorneys appearing herein, Englehard, Pollak, Pitcher, Stern, & Clarke, in satisfaction of the aforesaid indebtedness, the sum of Ten thousand five hundred dollars ($10,500), with interest thereon from April 13, 1934.

5. The said Moscow Fire Insurance Company is justly indebted to Holger Zahle, as assignee of Forsakringsaktiebolaget Skandia, in the sum of Five thousand seven hundred fifty dollars ($5,750) as of April 13, 1934.

6. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator are hereby directed to pay to the said Holger Zahle, or to his attorneys appearing herein, Englehard, Pollak, Pitcher, Stern & Clarke, in satisfaction of the aforesaid indebtedness, the said sum of Five thousand seven hundred fifty dollars ($5,750), with interest thereon from April 13, 1934.

7. The Moscow Fire Insurance Company is justly indebted to Gerson Jakubovic, Meier Jakubovic, Liba Jakubovic, Chaja-Elka Jakubovic, Riva Jakubovic, Amalia Jakubovic, and Scheine Joffe nee
Jakubovic, in the sum of One thousand one hundred and two
83 dollars ($1,102) as amount due under policy of insurance, with interest thereon at the rate of four and nine-tenths per cent (4.9%) per annum from June 1, 1916.

8. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator are

hereby directed to pay to the said Gerson Jakubovic, Meier Jakubovic, Liba Jakubovic, Chaja-Elka Jakubovic, Riva Jakubovic, Amalia Jakubovic, and Scheine Joffe nee Jakubovic, or to their attorneys appearing herein, Englehard, Pollak, Pitcher, Stern & Clarke, in satisfaction of the aforesaid indebtedness, the sum of One thousand one hundred two dollars ($1,102), with interest thereon at the rate of four and nine-tenths per cent (4.9%) per annum from June 1, 1916.

9. The Moscow Fire Insurance Company is justly indebted to Robert Natus in the sum of Three thousand four hundred sixteen and 02/100 dollars ($3,416.02), as amount due under policy of insurance.

10. The said Moscow Fire Insurance Company and Paul Lucke, as sole surviving director of Moscow Fire Insurance Company and conservator of its property, and Bank of New York and Trust
84 Company, as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke, as surviving director and conservator, are hereby directed to pay to the said Robert Natus, or to his attorney appearing herein, Chester W. Davis, in satisfaction of the aforesaid indebtedness the sum of Three thousand four hundred sixteen and 02/100 dollars ($3,416.02).

11. The Moscow Fire Insurance Company is justly indebted to Joint Stock Company of Cotton Manufacturer Lorentz & Krusche of Zgierz, Poland, in the sum of Twenty thousand dollars ($20,000) as amount due under claim as adjusted pursuant to a judgment of the District Court of Warsaw, Poland.

12. The said Moscow Fire Insurance Company and Paul Lucke, as sole surviving director of Moscow Fire Insurance Company and conservator of its property, and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of said Paul Lucke, as surviving director and conservator, are hereby directed to pay to the said Lorentz & Krusche, or to their attorney, appearing herein, Chester W. Davis, in satisfaction of the aforesaid indebtedness, the sum of Twenty thousand dollars ($20,000).

13. The said Moscow Fire Insurance Company is justly indebted to Carl Otto von Hollitscher and Paul F. Gottlieb, co-partners transacting business in Berlin, Germany, under the firm name and
85 style of Heckscher & Gottlieb in the sum of Thirty thousand dollars ($30,000) for commissions and services.

14. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator, are hereby directed to pay to the said firm of Heckscher & Gottlieb, or to their attorneys appearing herein, Cabell, Ignatius & Lown, in satisfaction of the aforesaid indebtedness the said sum of Thirty thousand dollars ($30,000).

15. That Paul Lucke had the authority both as General Manager and with the Power of Attorney of September 28, 1918, and as conservator of the assets of Moscow Fire Insurance Company as sole surviving director and the General Manager of the Company, to enter into the agreement for compensation with Heckscher & Gottlieb; that the amount therein agreed to be paid is reasonable and is a valid and binding charge against the assets of the Moscow Fire Insurance Company now in the possession or under the control of the plaintiff.

16. That Heckscher & Gottlieb are entitled to receive out of the assets of the Moscow Fire Insurance Company now in plaintiff's possession the sum of Thirty thousand dollars ($30,000).

86 17. The said Moscow Fire Insurance Company is justly indebted to Assecuranz Union Von 1865, of Cologne, Germany, in the sum of Three thousand one hundred fifty-five and 12/100 dollars ($3,155.12), as of July 1927, on balance of account.

18. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator are hereby directed to pay to the said Assecuranz Union Von 1865, or to their attorneys appearing herein, Cabell, Ignatius & Lown, in satisfaction of the aforesaid indebtedness the said sum of Three thousand one hundred fifty-five and 12/100 dollars ($3,155.12) with interest thereon from July 1, 1927.

19. That Heckscher & Gottlieb had the power and authority under the power of attorney and agency commission granted them by the Moscow Fire Insurance Company, and in force during the year 1916, to arrange for the retrocession of the business of the Moscow Fire Insurance Company under the several insurance treaties which had been negotiated by Heckscher & Gottlieb for the Moscow Fire Insurance Company with direct writing companies in Germany and elsewhere, to the Assecuranz-Union von 1865.

87 20. That the said retrocession arrangements in view of the Russian decree of November 1916 prohibiting further intercourse or communication between the subjects of the Russian Empire and Germany and its subjects; and of the serious consequences to the Moscow Fire Insurance Company which might have ensued in the event of a total default by it in the performance of its obligations to the direct writing companies under the several treaties then current, were proper and necessary measures for the protection of the interests of the Moscow Fire Insurance Company in view of the then emergency.

21. The said Moscow Fire Insurance Company is justly indebted to Vladimir A. Miller, of Paris, France, in the sum of Thirty-four thousand three hundred and two and 51/100 dollars ($34,302.51) for legal services from 1923, with interest on Twenty-four thousand

nine hundred and seventy-five and 82/100 dollars ($24,975.82) thereof from August 11, 1931.

22. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property, and Bank of New York and Trust Company, as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator, are hereby directed to pay to the said Vladimir A. Miller, or to his attorney appearing herein, Hartwell Cabell, in satisfaction of the aforesaid indebtedness, the said sum of Thirty-four
88 thousand three hundred and two and 51/100 dollars ($34,302.51) with interest on Twenty-four thousand nine hundred and seventy-five and 82/100 dollars ($24,975.82) thereof from August 11, 1931.

23. That Paul Lucke had authority both as General Manager under the Power of Attorney of September 28, 1918, and as Conservator of the assets of the Moscow Fire Insurance Company as sole surviving director and General Manager of the Company, to enter into the contract of employment with Miller; that the fees therein agreed to be paid are a reasonable, valid, and binding charge against the assets of the Moscow Fire Insurance Company now in the possession or under the control of the plaintiffs.

24. That the said Miller is entitled to receive out of the assets of the Moscow Fire Insurance Company now in the plaintiffs' possession the sum of Twenty-four thousand nine hundred and seventy-five and 82/100 dollars $24,975.82), with interest thereon from August 11, 1931, being the date of the remittitur from the Court of Appeals in Matter of People (Moscow Fire Insurance Company).

25. That the said Miller is entitled to receive out of the said assets the sum of Ten thousand dollars ($10,000), less Six hundred and seventy-three and 31/100 dollars ($673.31), being the sum of Nine thousand three hundred twenty-six and 69/100 dollars ($9,326.69), with interest upon each installment from the end
89 of the year in which it was payable after deducting from such instalment the dollar equivalent of the amounts paid in francs during such year, together with interest upon the unpaid portion of said annual payments calculated from the close of the year in which they fell due.

26. The claimant Miller is represented by his attorney in fact, Hartwell Cabell, Esq., who is authorized to receive payment and to give discharges on behalf of said claimant.

27. The said Moscow Fire Insurance Company is justly indebted to Michael Imchanitzky, of New York City, in the sum of Eleven thousand seven hundred and fifty dollars ($11,750), for legal services and disbursements from August 11, 1931.

28. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Com-

pany as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator are hereby directed to pay to the said Michael Imchanitzky in satisfaction of the aforesaid indebtedness the said sum of Eleven thousand seven hundred and fifty dollars ($11,750).

29. The said Moscow Fire Insurance Company is justly indebted to Bazile Gartoung in the sum of Three thousand five hundred dollars ($3,500), as balance of compensation due under contract of employment.

90 30. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator are hereby directed to pay to the said Bazile Gartoung, or to his attorney appearing herein, Osmond K. Fraenkel, the said sum of Three thousand five hundred dollars ($3,500).

31. The said Moscow Fire Insurance Company is justly indebted to Paul Lucke, of Paris, France, in the sum of Sixty thousand dollars ($60,000) as balance due for services from November 1918.

32. The said Moscow Fre Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator are hereby directed to pay to Paul Lucke in satisfaction of said indebtedness the said sum of Sixty thousand dollars ($60,000).

33. The said Moscow Fire Insurance Company is justly indebted to Frederick B. Campbell and Paul C. Whipp, as copartners practicing law under the firm name and style of Campbell & Whipp, for legal services and disbursements for the period beginning

91 August 11, 1931, and ending April 19, 1933, in the sum of Seventeen thousand eight hundred seventy-four and 99/100 dollars ($17,874.99).

34. The said Moscow Fire Insurance Company and Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator are hereby directed to pay to the said firm of Campbell & Whipp in satisfaction of said indebtedness the said sum of Seventeen thousand eight hundred seventy-four and 99/100 dollars ($17,874.99).

35. After making provision for payment of the indebtedness of the said Moscow Fire Insurance Company and the expenses of the present action, and after making further reservation of a reasonable amount for payment of any future claim and expenses, a balance of Seven hundred thousand dollars ($700,000) is hereby de-

clared to be available for a dividend in liquidation to the shareholders of Moscow Fire Insurance Company to be distributed pro rata to those entitled thereto in the proportion of Seventy dollars ($70.00) for each share of the said Company issued and outstanding.

36. The said Moscow Fire Insurance Company and the said Paul Lucke as sole surviving director of Moscow Fire Insurance Company and conservator of its property and Bank of New York
92 and Trust Company as agent or depositary of Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator, are hereby directed to pay to each shareholder of the Company, or to his heirs, legal representatives, attorneys in fact, or assigns, in accordance with the determination of their several rights and interests in this action, the said sum of Seventy dollars ($70.00) upon and in respect of each share of the said Moscow Fire Insurance Company owned by such shareholder, or his heirs, representatives, or assigns.

37. For the purpose of carrying out the directions for the payment of the dividend in liquidation hereinbefore directed, the following payments are hereby directed to be made by said Moscow Fire Insurance Company and said Paul Lucke, as surviving director and conservator, or by said Bank of New York and Trust Company, as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke, as surviving director and conservator to the following shareholders, or their heirs, legal representatives, attorneys, or assigns, as hereinafter specified:

93

No. on list	Name of shareholder	Name of payee	Amount to be paid
4, 5 and 6	Asov-Don Commercial Bank	Asov-Don Commercial Bank	$3,850.00
8	Antonina Davydovna Alexeieva	William Stern, as administrator of Estate of Antonina Davydovna Alexeieva.	840.00
12	Fedor Romanovitch Amlong	Fedor Romanovitch Amlong	1,120.00
13	Carl Romanovitch Amlong	Carl Romanovitch Amlong	1,750.00
16	Malvina Stepanovna Ananova	Malvina Stepanovna Ananova	840.00
17	Innokenti Semenovitch Andreiev	Sophia Vassilievna Netchaev	210.00
19	Maria Germanovna Arnaud	Maria Germanovna Arnaud	1,750.00
21	Alice Friedrichovna Asmus	Alice Friedrichovna Asmus	560.00
28	Nikolai Dmitrievitch Banketov	Nikolai Dmitrievitch Banketov	210.00
30	Mavriki Nelken	Mavriki Nelken	700.00
31	Carl Leontievitch Bauer	Elizabeth Georgine Hoeltzke	875.00
		Sophie Margarete Law-Gisikow	875.00
		Waldemar Stoecker	218.75
		Herman Stoecker	218.75
		Olga Stahl	218.75
		Alexis Stoecker	218.75
		Helene Waloff	218.75
		Leo Foerster	218.75
		Marina Foerster	218.75

(Thereafter follow similar items to the number of over four hundred, specifying additional shareholders, payees, and amounts.)

94 38. In lieu of payment to any payee named in the preceding paragraph numbered 37, the said Moscow Fire Insurance Company and Paul Lucke as surviving director and conservator, or the said Bank of New York and Trust Company, as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator, may make payment of the amount due to such payee, to the attorney for such payee as established in this action, or by powers of attorney filed with the said Moscow Fire Insurance Company and Paul Lucke as surviving director and conservator, or with the said Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator.

39. The respective amounts of the dividend in liquidation of shareholders whose interests have not been determined herein, and whose names and respective interests have not been set forth in the preceding paragraph numbered 37, are hereby directed to be reserved and retained by said Bank of New York and Trust Company, as agent or depositary of said Moscow Fire Insurance Company, and of the said Paul Lucke, as surviving director and conservator, pending the further determination and order of this Court.

40. Any shareholder or any party to this action or any successor in interest to any such shareholder or party shall be at liberty
95 to apply from time to time at Special Term, Part I, at the foot of this judgment on notice of the attorneys for the several plaintiffs and to the attorneys for defendant shareholders for such further directions or instructions as may be proper.

Dated, New York, August 22nd, 1934.

ALBERT MARINELLI, *Clerk.*

Approved as to Form:
JAMES F. DONNELLY,
Referee.

96 *Exhibit 5, attached to affidavit of John C. Vedder*

Department of Justice

United States Attorneys' Office, New York

Address reply to "United States Attorney" and Refer to Initials and number EJE 70805/3D Pre T-206.

AUGUST 18, 1934.

BANK OF NEW YORK & TRUST COMPANY,
48 Wall Street, New York, N. Y.

SIRS: On behalf of the United States I am authorized to demand; and I hereby demand, delivery and surrender by you to the United States, as lawful owner entitled to possession, certain securities and assets of the value of $1,080,399.54, received by you as depositary

or agent of the Moscow Fire Insurance Company on or about April 18, 1933, from the Superintendent of Insurance of the State of New York. I also demand any securities and assets substituted by you for the aforesaid securities.

As soon as you advise me that the securities and assets are ready for delivery to the United States you will be advised of the manner of delivery.

Respectfully,

(Signed) MARTIN CONBOY,
United States Attorney.

97 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit of Frederick B. Campbell, verified September 11, 1934, in opposition to complainant's motion for injunction pendente lite

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

FREDERICK B. CAMPBELL, being duly sworn, deposes and says:

1. That he is an attorney at law and a member of the firm of Campbell & Whipp. That such firm and its predecessor law firms have been attorneys and counsel in the United States for the Moscow Fire Insurance Company and the United States branch thereof since in or about the year 1900, when such United States branch was established. That especially since the Russian revolution, resulting in the establishment of the present Soviet government of Russia, deponent has been personally and continuously engaged as at-

98 torney and counsel upon the affairs of the Moscow Company and is personally familiar with all the events pertaining to the said Moscow Company in this country and its United States branch since the beginning of the Russian revolution in October–November 1917.

2. At the time of the beginning of the Russian revolution, the Moscow Fire Insurance Company, through its United States branch located in the City of New York, was actively engaged in the transaction in the State of New York and in the United States of the business of reinsurance of fire risks under annual license from the Superintendent of Insurance of the State of New York and from the Insurance Departments of other states. As required by the laws of the State of New York and by the laws of other states, the said Company maintained in the United States a separate capital for the business of its United States branch, such capital consisting of securities deposited with the Superintendent of Insurance of the State of New York and with the Bankers Trust Company of the City of New York, as trustee, all in trust for the protection of the

policyholders and creditors within the United States of the said Moscow Fire Insurance Company. Such securities consisted of obligations issued by the Government of the United States and by the City of New York.

3. The business of the United States branch of the Moscow Company under annual license, as aforesaid, continued as theretofore, notwithstanding the events of the Russian revolution, until in
99 or about the month of March 1923, at which time the reinsurance treaties under which the United States branch of said Company had been transacting business were cancelled. After March 1923 the United States branch of said Company assumed no new risks but continued thereafter, until August 1925, the transaction and settlement of its business under risks which had been assumed prior to March 1923.

4. By order of the Supreme Court of the State of New York, New York County, dated August 8, 1925 (resettled September 11, 1925), the Superintendent of Insurance of the State of New York was appointed Liquidator of the United States branch of said Moscow Fire Insurance Company under and pursuant to the provisions of Section 63 of the Insurance Law of the State of New York. Thereafter, the Superintendent of Insurance, as such liquidator, took into his possession all of the assets of the United States branch of said Moscow Company and proceeded therefrom to pay and satisfy all the claims of the Company's policyholders and creditors within the United States. After satisfaction of all just claims of such policyholders and creditors within the United States, there remained a substantial surplus the disposition of which was the subject of judicial decision by the Courts of the State of New York. By a final decision of the New York State Court of Appeals rendered on February 10, 1931, and reported in 255 N. Y. 433, and other related decisions reported at pages 415–432 of the same volume of the
100 N. Y. reports, and by the order of the State Supreme Court entered August 11, 1931, upon the remittitur of the Court of Appeals, the Superintendent of Insurance of the State of New York was directed to dispose of such surplus funds as follows:

(a) To pay therefrom all just claims of foreign creditors of the Moscow Fire Insurance Company which had been filed with the Superintendent of Insurance prior to August 11, 1931, the date of the said order on remittitur;

(b) To retain the balance of such surplus for a period of four months after August 11, 1931, to permit any other foreign creditor of the said Moscow Fire Insurance Company to attach the same in actions at law against the said Moscow Fire Insurance Company;

(c) To pay and deliver the balance of such surplus funds remaining after payment of foreign creditors who had filed claims and after reservation of an amount sufficient to protect foreign attachment creditors, to Paul Lucke, the sole surviving director of the

said Moscow Fire Insurance Company, as conservator of the property of the said Company, upon condition that he, the said Paul Lucke, should execute a bond to the People of the State of New York with a condition to the effect that he would faithfully apply the assets to the use of the Moscow Fire Insurance Company, its creditors and shareholders. As an alternative to the giving of the bond hereinabove specified, it was provided in said decision of the
101 Court of Appeals and in the said order of the Supreme Court on remittitur, that upon the election of the said Moscow Company the surplus funds should be released, paid, transferred, and delivered to Bank of New York and Trust Company as the agent or depositary of said Moscow Fire Insurance Company and of the said Paul Lucke as surviving director and conservator, upon the filing with the Clerk of the Supreme Court of the State of New York of a written stipulation of the said Moscow Fire Insurance Company and of the said Paul Lucke as such surviving director and conservator of said Company, that such surplus assets or fund would not be withdrawn except upon the order of a court of competent jurisdiction.

5. The said Moscow Fire Insurance Company and its surviving director and conservator, Paul Lucke, elected to have such surplus assets delivered to the Bank of New York and Trust Company as agent or depositary, and the said Moscow Fire Insurance Company and Paul Lucke, as such surviving director and conservator, executed and filed the stipulation prescribed by the said decision of the Court of Appeals and by the said order on remittitur thereof. Thereafter and on April 18, 1933, the surplus assets of the said Moscow Company were delivered by the Superintendent of Insurance of the State of New York as Liquidator of the said Moscow Fire Insurance Company to the said Bank of New York and Trust Company as agent or depositary as aforesaid.

6. On April 19, 1933, a suit was begun in the New York
102 State Supreme Court by the said Moscow Fire Insurance Company and Paul Lucke as sole surviving director and conservator to determine the disposition of the assets in the custody of the said Bank of New York and Trust Company, as agent or depositary of the said Moscow Company and of the said Paul Lucke as surviving director and conservator. All known creditors and shareholders of the said Moscow Company were joined as parties defendant to the suit on their own behalf and on behalf of others similarly situated. A copy of the complaint in said suit is attached as an exhibit to the affidavit of John C. Vedder, the vice-president of the defendant Trust Company. On June 23, 1933, a second suit was begun in the New York State Supreme Court by a shareholder of the said Moscow Company against the said Bank of New York and Trust Company and others to obtain the instructions of the said Court with reference to the disposition of the funds of the said Company. The said suits were thereafter consolidated by order of the

New York Supreme Court and all the issues therein were referred by the said N. Y. Supreme Court to James F. Donnelly, Esq., of the City of New York, as Referee to hear and determine all of the issues in the said suits. The trial of the said suits began before the said Referee on March 16, 1934, and continued actively thereafter until August 9, 1934. On August 13, 1934, the United States by its attorney, Martin Conboy, United States Attorney for the Southern District of New York, filed with the said Referee a proof of claim entitled in the said suits, a true copy of which is hereto attached and made a part hereof, marked "Exhibit A." On August 4,
103 1934, at a hearing before said Referee with reference to said proof of claim, at which representatives of the U. S. District Attorney were present, the said Referee stated that he would withhold his decision in said suits for one week to allow time to the United States to take such steps as it should deem advisable with reference to such proof of claim. The United States having taken no further proceedings in said suits, but on the contrary having informed the said Referee that it did not intend to take any further proceedings in said suits, on August 21, 1934, the said Referee rendered his report to the Supreme Court of the State of New York, which was duly filed in the office of the Clerk of the County of New York on August 22, 1934. On August 22, 1934, judgment on the said report of the said Referee was entered and filed in the office of the Clerk of the County of New York and on said day served upon the said Trust Company. Such judgment directs the payment of certain remaining creditors of the said Moscow Company and further directs the payment from the balance of the funds of the said Moscow Company of a dividend in liquidation to the shareholders of the Company, without distinction as between shareholders residing outside of Soviet Russia and those residing within Soviet Russia. Said judgment was entered upon the report of a referee to hear and determine all issues in such suits as consolidated, a copy of which report is hereto annexed and made a part hereof marked "Exhibit B." There is further submitted to the Court herewith a copy of the opinion of James F. Donnelly, Esq., the said referee, which is marked
104 "Exhibit C" and made a part hereof, such opinion being submitted separately by reason of difficulty in binding it herewith.

7. All of the creditors of the said Moscow Company hereinbefore referred to with one exception, and a large number of the shareholders of the said Company are, as shown in the report of the said Referee, nonresidents of Russia and citizens of countries other than Russia. Certain of such creditors and shareholders are citizens of the United States.

8. No part of the funds and securities in the custody of the Bank of New York and Trust Company, as agent or depositary of the said Moscow Company and of the said Paul Lucke as surviving director and conservator, was ever within the territory of the State of Russia or within the control of the government of Russia. Such funds and securities constitute the residue of the capital of the

United States branch of the said Moscow Company and have never been within the possession, control, or subject to the order or confiscatory decrees of the present Soviet government of Russia.

FREDERICK B. CAMPBELL.

Sworn to before me this 11th day of September 1934.

[SEAL.] L. D. BATES,
Notary Public, Kings County.

Clerk's No. 274, Register's No. 6314.
N. Y. Co. Clks. No. 780, Reg. No. 6–B–439.
Queens Co. Clks. No. 421, Reg. No. 2290.
Commission expires March 30, 1936.

105 *Exhibit A, attached to affidavit of Frederick B. Campbell, verified September 11, 1934*

Supreme Court, New York County

MOSCOW FIRE INSURANCE COMPANY, OF MOSCOW, RUSSIA, AND PAUL LUCKE, as Sole Surviving Director of Moscow Fire Insurance Company, of Moscow, Russia, and Conservator of its Property, plaintiffs

against

BANK OF NEW YORK AND TRUST COMPANY, AS AGENT OR DEPOSITARY of said Moscow Fire Insurance Company, of Moscow, Russia, and of the said Paul Lucke, as Surviving Director and Conservator; et al., defendants

Proof of Claim

Now comes the United States of America by its attorney, Martin Conboy, United States Attorney for the Southern District of New York, and presents this Proof of Claim in the amount of $1,080,399.54, with interest from April 18, 1933, being the value of the surplus assets or funds of the plaintiff, Moscow Fire Insurance Company, released, paid, transferred, and delivered by the
106 Superintendent of Insurance of the State of New York, as liquidator of the plaintiff, Moscow Fire Insurance Company, to the defendant, Bank of New York and Trust Company, on the 18th day of April 1933.

The basis of the claim of the United States is as follows:

1. The plaintiff, Moscow Fire Insurance Company, of Moscow, Russia, a corporation organized under the former Imperial Government of Russia, did business in the United States and in the State of New York, and in relation to such business, deposited certain cash and securities as reserves in compliance with the statutes of New York, part of which funds are the aforesaid surplus or assets transferred to the defendant, Bank of New York and Trust Company, on the 18th day of April 1933.

2. By various decrees, the Union of Soviet Socialist Republics, successor of the Russian Imperial Government, dissolved the plaintiff, Moscow Fire Insurance Company, and appropriated all of its property.

3. By various decrees, the Union of Soviet Socialist Republics, successors of the Russian Imperial Government, appropriated all the rights, titles, and the interests of all stockholders in the plaintiff, Moscow Fire Insurance Company.

4. The Superintendent of Insurance of the State of New
107 York, pursuant to an order of the Supreme Court of New York, transferred the surplus of the assets in his hands after the payment of domestic creditors to the defendant, Bank of New York and Trust Company.

5. On or about April 19, 1933, this action by the plaintiff, Moscow Fire Insurance Company, was commenced and the relief and judgment prayed for was to determine the disposition of the aforesaid funds and securities in the hands of the defendant, Bank of New York and Trust Company; to determine the claims of creditors; to designate conservators to be authorized and directed to pay to the shareholders of the plaintiff company, their executors and assigns, outside of Russia on account of their respective ratable interests in the balance of the funds and securities hereinbefore specified, such amount as the Court shall determine.

6. In November 1933 the Government of the United States recognized the Government of the Union of Soviet Socialist Republics, and complete diplomatic relations were established between the Governments.

7. By an exchange of notes between the President of the United States and Maxim Litvinoff, People's Commissar for Foreign Affairs, Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics assigned to the United States all claims in the United States of the Union of Soviet Socialist Republics, as successor of prior Governments of Russia and otherwise, and of their nationals.

108 8. By letter dated November 16, 1933, to the President of the United States, signed by Maxim Litvinoff, the Government of the Union of Soviet Socialist Republics agreed as follows:

"Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the

claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment."

109 9. By letter dated November 16, 1933, to Maxim Litvinoff signed by the President of the United States, the assignment of these claims was acknowledged.

Wherefore, the United States asserts its claim as a prior claim to all the assets specified hereinabove and prays that its prior claim in the amount of $1,080,399.54 be recognized and allowed, and that the defendant, Bank of New York and Trust Company, be ordered to pay over to the United States the amount of $1,080,399.54, with interest.

MARTIN CONBOY,
United States Attorney, Southern District of New York, Attorney for United States, Office & P. O. Address: U. S. Courts & P. O. Bldg., Broadway and Park Row, Borough of Manhattan, City of New York.

AFFIDAVIT TO VERIFIED CLAIM

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

EDWARD J. ENNIS, being duly sworn, deposes and says, on information and belief:

That he is an Assistant United States Attorney in and for
110 the Southern District of New York, in charge of the prosecution of the claim of the United States, the creditor named in the annexed claim, against the Bank of New York and Trust Company.

That the annexed claim against the said Bank of New York and Trust Company is in all respects correct and true. That the sum of $1,080,399.54, with interest from April 18, 1933, is justly due and owing to the United States from the Bank of New York and Trust Company.

That said creditor holds no security for such claim. That no payment has been made. That there are no offsets or counterclaims thereto, either at law or in equity, to the best knowledge and belief of the deponent.

That the reason this affidavit is made by the deponent and not by the creditor is that the creditor is a corporation sovereign.

That the sources of deponent's information and the grounds of his belief are communications from the Department of State of the

United States, from the Department of Justice of the United States, and the records of the Office of the United States Attorney for the Southern District of New York.

EDWARD J. ENNIS.

Sworn to before me this 13th day of August 1934.

ARMAND CHANKALIAN,
Notary Public, New York Co.

Clerk's No. 327, Reg. No. 5C468, Commission expires March 30, 1935.

111 *Exhibit B attached to affidavit of Frederick B. Campbell, verified September 11, 1934*

REFEREE'S REPORT

(This exhibit is the report of the referee in the action in the N. Y. Supreme Court, the judgment in which action is hereinbefore printed and the opinion of the referee in the same action follows. This report consists of 109 typewritten pages of legal cap and is not printed by consent.)

Exhibit C attached to affidavit of Frederick B. Campbell, verified September 11, 1934

REFEREE'S OPINION

Supreme Court, New York County

MOSCOW FIRE INSURANCE COMPANY, OF MOSCOW, RUSSIA, AND PAUL LUCKE, as Sole Surviving Director of Moscow Fire Insurance Company of Moscow, Russia, and Conservator of its Property, plaintiffs

against

BANK OF NEW YORK AND TRUST COMPANY, AS AGENT OR DEPOSITARY of said Moscow Fire Insurance Company of Moscow, Russia, and of the said Paul Lucke as Surviving Director and Conservator; Assecuranz Union Von 1865; Carl Otto von Hollitscher and Paul F. Gottlieb, Copartners, Transacting Business Under the Firm
112 Name and Style of Heckscher & Gottlieb; Bertram Aymer Cater; Georg J. Fahrbach; Vladimir A. Miller; Michael Imchanitzky; and Fedor R. Amlong, Carl R. Amlong, Maria G. Arnaud, Alice F. Assmus [and 143 Other Named Defendants], as Stockholders of Moscow Fire Insurance Company, of Moscow, Russia, on Behalf of Themselves and all Other Stockholders Similarly Situated of said Moscow Fire Insurance Company, of Moscow, Russia, defendants

SAMUEL E. MORRO, MARIE LOBKOSCHEBOUNINE, BONA WIKTORJA Kruger, and Vladimir Velichko, in Behalf of Themselves and all Other Stockholders of Moscow Fire Insurance Company, of Moscow, Russia, plaintiffs

against

MOSCOW FIRE INSURANCE COMPANY, OF MOSCOW, RUSSIA, PAUL LUCKE and Bank of New York and Trust Company, as Agent and Depositary of said Moscow Fire Insurance Company, of Moscow, Russia, and of said Paul Lucke, defendants

Campbell & Whipp, Esqs., Attorney for Plaintiffs; Paul C. Whipp, Esq., Frederick B. Campbell, Esq., of Counsel.

Osmond K. Fraenkel, Esq., Attorney for Defendants; Vladimir Kentman, Andrei D. Pavloff et al.

113 Cabell, Ignatius & Lown, Esqs., Attorneys for Defendants, Heckscher & Gottlieb Assecuranz Union, and Vladimir A. Miller; Hartwell Cabell, Esq., of Counsel.

Engelhard, Pollak, Pitcher, Stern & Clarke, Attorneys for Defendants; Gerson Jakubovic, Meier Jakubovic, et al.; Frederic C. Pitcher, Esq., and George H. Hardinoff, Esq., of Counsel.

Henry Breckinridge, Esq., Attorney for Defendants, Eugenie M. Mikhailoff and Valentina N. Barthel-Mikhailoff Schott; James F. Phelan, Esq., of Counsel.

Samson Selig, Esq., Attorney for Defendant, Helene Tschitscherin; A. J. Multer, Esq., of Counsel.

Emmet, Marvin & Martin, Esqs., Attorneys for Bank of New York and Trust Company; Miss Elizabeth M. Graham, of Counsel.

114 Borris M. Komar, Esq., Attorney for Samuel E. Morro, Bona Wiktorja Kruger and Vladimir Velichko.

White & Case, Esqs., Attorneys for Defendant, Olga I. Hoppe; Thomas Kiernan, Esq., of Counsel.

Alfred L. Green, Esq., Attorney for Defendant, Michael J. Imchanitzky.

Michael J. Imchanitzky, Defendant in Person.

Vladimir A. Miller, Defendant in Person.

JAMES F. DONNELLY, *Referee:*

These are two consilidated actions for distribution of surplus of the Moscow Fire Insurance Company to shareholders after payment of certain claims of creditors and claims against said funds of Moscow Fire Insurance Company for services rendered in preservation thereof and investigation of the claims against said funds and later in aid of their proper distribution.

Moscow Fire Insurance Company is a Russian corporation organized in 1858 under the laws of the Empire of Russia and had been engaged down to November 1918, the date of the Russian Revolu-

tion, in the business of fire insurance in the Empire of Russia
115 and throughout Continental Europe and in the United States.
At the present time it is not engaged in business anywhere in the world.

About 1900 it established a United States branch, having made the deposit required by law to qualify, and it continued engaged in the transaction of said fire-insurance business in this country under an annual license obtained from the Superintendent of Insurance until about January 1, 1923. Four other Russian companies had likewise qualified and were doing business here at the same time, the Russian Reinsurance Company, the First Russian, the Second Russian, and the Northern of Moscow.

In August 1925, by reason of the consequences resulting from the Russian revolution the Superintendent of Insurance of this State took over the United States branches of several of these companies for liquidation because of the hazards and dangers threatening their assets and funds. Ordinarily, upon completion of the domestic liquidation and the payment of domestic creditors and policy holders, the surplus would be transmitted to a domiciliary receiver (Matter of Norsks Lloyd, 242 N. Y. 148; Matter of City Equitable, 238 N. Y. 147) and would not be disposed of in the ancillary or domestic jurisdiction. But in the situation presented to this Company and to other insurance companies because of their nonrecognition of the existing government in Russia by the United States at the time the liquidation
proceedings were completed in 1931, it became necessary, so
116 the courts adjudged, to wind up the foreign company in so far as its assets were represented by a surplus here.

The Soviet Government during the revolution had nationalized, sequestered, and confiscated all the assets of this and other companies; their liabilities were left unsettled and their officers and directors continued for a time in Russia to administer the business of the company, but in 1919–1920 many of the officers of these companies left for other parts of Europe in order to be in a position to conserve and dispose of the assets of these companies located in the British Isles, Continental Europe, and in the United States. By reason of the nonrecognition by the United States of the Soviet Government difficult problems in the surrender and disposition of these funds arose not merely in disposition of surplus of these insurance companies, but also because of the action of the Soviet Government in nationalizing these companies.

The history of these difficulties is dealt with in a series of litigations conducted in this country as well as in Great Britain, and elsewhere in Europe which resulted in a number of important decisions involving international law and interpreting situations confused by conflict of laws. These decisions affected not only these foreign insurance companies but many British companies, and United States banking and insurance companies, as well (Sokoloff v. National City Bank, 239 N. Y. 158; Petrogradsky N. K. Bank v. National City Bank, 253 N. Y. 23; Severnoe Securities v. Westminster Bank, 214

App. Div. 14; Sliosberg v. New York Life Ins. Co., 244 N. Y.
117 482; Severnoe Sec. Corp. v. London & Lancashire Ins. Co.,
255 N. Y. 120; Vladikavkassky Ry. Co. v. New York Trust Co., 263 N. Y. 369).

Not only did the action of the Soviet Government lead eventually to the liquidation of these insurance companies through the Superintendent of Insurance, but, prior to 1925, in advance of entry of the order of liquidation it induced the directors of these companies to leave Russia to seek a recovery of part of the surplus out of domestic branches of certain of these insurance companies, which efforts were successful to a degree (Andre v. Beha, 211 App. Div. 380; 240 N. Y. 605; First Russian Insurance Co. v. Beha, 240 N. Y. 601; Russian Re-Insurance Co. v. Stoddard, 240 N. Y. 149).

The liquidation order entered in 1925 affecting these insurance companies with its injunctive features prevented further action to take down deposits required by law or any part of the surplus until at least the liquidation was completed and the several efforts to take down the surplus of such companies were defeated in the courts.

The problem of final distribution of surplus, however, remained.

When, however, the liquidation was complete and the problem of distribution confronted the courts, it was finally determined that equity having taken jurisdiction it would continue to exercise its control even to the point of, in effect, liquidating a foreign company insofar as certain of its assets in this jurisdiction
were concerned. (Matter of People, Russian Reinsurance
118 Co., 255 N. Y. 415, 423; Matter of People, Northern Insurance Company, 255 N. Y. 433; Matter of People, Second Russian Insurance Co., 255 N. Y. 437; Matter of People, First Russian Insurance Co., 255 N. Y. 440.)

Ordinarily of course, this would not be done by our courts as to a foreign corporation organized under one of the laws of a foreign state unless there were peculiar or exceptional circumstances. (People v. Granite State Provident Association, 161 N. Y. 492.)

When the liquidation was complete, the Superintendent of Insurance requested that all surplus funds of these Russian Insurance companies be held until recognition of a government in Russia. The Supreme Court at Special Term and by unanimous affirmance at the Appellate Division (Matter of Russian Reinsurance Company, 229 App. Div. 637) accepted this view and ruled that the distribution of the surplus funds and the settlement of foreign claims and delivery of assets which normally would be sent and settled abroad should await recognition of a government in Russia. The Court of Appeals, however, felt that equity having taken jurisdiction should completely and at once dispose of the entire funds which were in the possession of the Superintendent of Insurance. As that court viewed the situation, domestic creditors and policyholders were paid; certain foreign creditors who had acquired liens by attachment before the liquidation was begun were also paid;

postponement of distribution of surplus meant unreasonable
119 delay and inasmuch as the Superintendent of Insurance had fulfilled his statutory trust there should be a present distribution in order to prevent further hardship and inequity.

Accordingly it was determined, wherever in any company there was a quorum of directors, that the funds should be turned over to the directors for disposition, but that where less than a quorum of directors existed the surplus would be received by the director or directors remaining, only upon furnishing a bond to apply the assets to the use of the corporation, its creditors and shareholders, or in the event of not giving a bond, to a trust company as depositary to hold it subject to further order of the courts.

Having provided that the surplus might be withheld by the Superintendent for a reasonable time after the entry of judgment in order to permit any creditors who had been stayed by the liquidation order from enforcing their remedies and to protect any liens that they might have, when the period limited by the court had been reached and such claims were paid or adjusted, the surplus was directed to be held for corporate uses and on the final distribution for the benefit of its creditors and shareholders.

In the case of the plaintiff company, it and its surviving director and conservator, Paul Lucke, consented by stipulation to have the final remaining surplus belonging to the company for such corporate uses turned over to the Bank of New York and Trust Company pursuant to the decision of the Court of Appeals (Matter of Moscow Fire Insurance Company, 255 N. Y. 433, 435).

120 Accordingly, on the 18th day of April 1933, pursuant to the remittitur handed down by the Court of Appeals and the stipulation entered into, the Bank of New York and Trust Company received from the Superintendent of Insurance the total surplus belonging to the plaintiff company.

In order to effectually distribute these funds and determine the rights of creditors, claimants, and shareholders, an action was begun about April 19, 1933, wherein the Moscow Fire Insurance Company and Paul Lucke were plaintiffs against Bank of New York and Trust Company with a number of shareholders and creditors as defendants. The summons in said action was served upon certain defendants personally and all other interested persons were duly served by publication pursuant to an order of this court entered on or about April 20, 1933.

Subsequently on the 23rd day of June 1933, another action was begun by stockholders, the plaintiff named being Marie Lobko-Schebounine, and in this action the plaintiffs in the first action and the Bank of New York and Trust Company were named defendants. Later, other stockholders were nominated in the title of said action as plaintiffs.

In this later action in addition to the usual relief sought in a stockholders action, the plaintiffs asked for the appointment of a Receiver to supersede Paul Lucke as conservator. In order to

effectuate, during the pendency of that action, this branch of
121 the relief, a motion for a receiver was made in the early stages of the action and for an injunction restraining any disposition of funds. This application was denied in toto by this court.

Later, an appeal was taken to the Appellate Division by the plaintiff from the order entered denying the application for appointment of a Receiver and an injunction. The order appealed from was later affirmed.

On the 13th day of October 1933 the issues in the first action brought were referred to me as Referee to hear and determine such issues.

During the progress of the reference in the first action, an order of consolidation was entered in the second action consolidating that action with the action first brought and a similar order of reference of the issues presented by the consolidated action were likewise referred to me to hear and determine.

The issues presented by the answers and counterclaims in some of the answers bring up for ascertainment and determination the rights of creditors and the rights of shareholders in the balance of the fund remaining after the claims were paid and the expenses of the action were met. The general purpose of both actions and the relief sought is to have the following dispositions made in reference to the funds—

1. That all creditors whose claims are decided in this action to be just, should be paid and the plaintiff conservator authorized and directed to make payments from the fund for that purpose.

2. That the compensation of the plaintiff conservator be
122 determined and paid; that the compensation of the defendant Bank of New York and Trust Company as agent or depositary be determined and paid; and that the allowance to counsel be determined and paid.

3. That out of the balance a fund to be fixed by the Court be reserved for any future contingencies including future necessary investigations as to shareholders who are not now known.

4. That all of the balance be divided pro rata among the shareholders of the company or their successors. That as to the shares of unknown shareholders, the balance in their favor remain on deposit with the Bank of New York and Trust Company until such unknown shareholder shall be ascertained and a further order of the court made with respect to them.

The securities in which the surplus belonging to the plaintiff company was invested during the pendency of this action were sold during the progress of the action, so that today the securities have been converted into cash resulting in a present cash surplus of $1,136,879.54. Most of the surplus was represented by corporate stock of the City of New York which was sold at a very satisfactory figure in order to reap the total surplus above indicated.

The fund as it is constituted in the Bank of New York and Trust Company after the conversion into cash and the amount of cash realized on the sale is as follows:

	Cash
123 Proceeds $500 City of New York 3½% corporate stock for Fire Department purposes due November 1, 1941, sold July 18, 1934, at 94 net plus interest	$473.69
Proceeds $30,000 City of New York 3½% corporate stock for Rapid Transit construction due November 1, 1949, sold July 18, 1934, at 93¾ net plus interest	28,346.67
Proceeds $583,000 City of New York 4% corporate stock due November 1, 1955, sold July 18, 1934, at 99⅝ net plus interest	584,214.58
Proceeds $235,000 City of New York 4% corporate stock due November 1, 1956, sold July 18, 1934, at 99⅝ net plus interest	235,515.68
Proceeds $150,000 City of New York 4% corporate stock for water supply due November 1, 1956, sold July 18, 1934, at 99⅝ net plus interest	150,312.50
	998,863.12
Cash otherwise on hand	138,016.42
	1,136,879.54

The proof presented before the Referee was received during
124 a period of five months during which time numerous claims of creditors were established and proof to determine the rights of numerous stockholders was presented. The following facts appear from this proof:

The capital of the Moscow Fire Insurance Company consisted of 2,000,000 rubles which was represented by 10,000 shares of stock issued and outstanding prior to the Russian revolution. The par value of each share was 200 rubles and all of the shares were registered.

The company kept a list of its shareholders and a certified list of such shareholders was presented to each annual meeting. At the last annual meeting of shareholders of the company on April 11, 1917, there was presented an alphabetical list of shareholders and when Mr. Lucke left Russia to go into France, where he had taken up his residence at Paris, he took with him these original documents which contain certain corrective notations made by him thereon in the course of business after 1918. Those notations and changes brought the shareholders list up to the date of November 15, 1918. This shareholders list, in the Russian language, was presented in evidence in order to establish a foundation for proof of the shareholders rights to the net surplus remaining after the claims of creditors were paid.

The claims of shareholders involve 140 living shareholders, 14 shareholders who assigned their shares and 100 shareholders who are dead and whose shares are the subject of disposition. The total number of shares presently represented by the above number
125 of shareholders aggregates about 6,500 shares out of a total of 10,000 shares. After the claims of creditors and the expenses of the action have been paid and a fund for future expenses has been set aside, disposition of the surplus would go to the foregoing shareholders or their assigns, or their legatees, heirs at law and next of kin.

Prior to the presentation of proof in the action an exhaustive and painstaking inquiry in Europe, outside of Russia with reference to the rights of creditors and shareholders was made by the plaintiff Paul Lucke. That investigation resulted in some instances in compromise and settlement and the negotiations leading up to the compromise and settlement were related in the proof submitted and where adjustment was reached it was submitted for the approval of the Referee. My findings with respect to such claims follow:

The defendant, Georg J. Falirbach of Riga, Latvia, had been an agent of the plaintiff company for some time prior to the Russian revolution and had a personal account with the company which on January 1, 1917, showed a balance in his favor amounting to 57,337.37 rubles. The proof established that the total balance in said defendant's favor was thereafter reduced so that at the time these proceedings were begun, the company owed him the sum of 56,134.74 rubles. The plaintiff Paul Lucke entered into negotiations with said Fahrbach in order to adjust and settle his claim as between the claimant and the company. The claim was adjusted in dollars for the total sum of $5,600, which represented an exchange value
126 of slightly less than 10 cents per ruble. The settlement and adjustment of this claim according to proof presented was a fair and reasonable adjustment and was made for the best interests of the company and its shareholders. The account and settlement are accordingly approved and the funds of the plaintiff company will accordingly be charged in favor of Georg J. Fahrbach in said sum of $5,600.

The defendant Brandforsikrings Selskabet Norge Drammen is an insurance corporation organized under the laws of Norway with a principal office in Drammen, Norway. This defendant did reinsurance business with the plaintiff company. During the period shortly prior to the Russian revolution a treaty of reinsurance was entered into by and between the Norwegian company and the Moscow Fire Insurance Company whereby the Norge Drammen reinsured certain risks assumed by the Moscow as the direct writing company. Resulting from this business a substantial balance accrued to Norge Drammen, the precise amount of which was disputed by the plaintiffs. Accordingly, Paul Lucke conducted negotiations with reference to an adjustment of this claim. The claim was later compromised and settled between the parties at $10,500 on April 13, 1934. The proof before the court established the treaty and the addendum thereto, and the monthly balance and books of account satisfactorily show to the court that a balance (in excess of the settlement) existed in favor of the Norge Corporation. The adjustment appears to be in settlement of a just claim, is reasonable in amount, and the
127 acceptance and payment of this claim is for the best interests of the Moscow Company and its shareholders and it is therefore approved.

The Brandforsikrings Selskabet Norge Drammen is entitled to recover of the Moscow Fire Insurance Company the said sum of $10,560 with interest thereon from April 13th, 1934 as agreed upon the adjustment.

The defendant Holger Zahle is an assignee of an insurance corporation of Stockholm, Sweden, known as "Forsakringsaktiebolaget Skandia."

This company and the Skandia entered into certain reinsurance relations under a treaty and an addendum thereto, whereby the Skandia reinsured certain risks assumed by the Moscow Fire Insurance Company, the direct writing company. Out of this business a substantial balance accrued in favor of Skandia. The precise balance is in dispute. Under another treaty wherein the corporation Skandia was the direct writing company, the plaintiff company was reinsurer. Out of this business an admitted accrued balance in favor of the plaintiff company as of December 31, 1918, resulted, to wit, the sum of 6,266.76 Kronen. The proof is that negotiations for a compromise and settlement under consideration during the trial before me were continued and finally it was agreed after giving credit for a certain balance of Swedish Kronen in favor of the Moscow Company that its claim be adjusted for $5,750. The adjustment agreed upon was to carry interest from the date of adjustment, to wit, April 13, 1934. Since this is a reasonable
128 adjustment for Moscow Fire Insurance Company and its shareholders, it is approved.

The defendants Gerson Jakubovic and Jaffe (nee Jakubovic) are the heirs and next of kin of one E. Jakubovic, deceased, late of Mitau, Russia. The Moscow Fire Insurance Company duly insured certain premises owned by asid Kakubovic against loss by fire for a period of twelve months beginning April 16th, 1915, in the sum of 22,345 rubles. While the policy was in force and effect the premises insured were damaged by fire resulting in a loss equalling 3,800 rubles.

The Moscow Company admits liability for said sum as of June 1, 1916; the claimants have accepted an offer of adjustment made by the Moscow Company in dollars totalling $1,102 with interest from June 1, 1916, at the rate of 4.9% per annum. The facts justify this compromise as it is for the best interests of the Moscow Company and accordingly it is approved.

On July 17, 1918, Robert Natus was the owner of a dye factory in Esthonia upon which a policy of insurance protecting the said premises against fire loss had theretofore been issued by the plaintiff company. Claimant's factory was later damaged by fire while the policy was in force and a resulting loss for which the insurer was liable equalled in rubles 17,754.80, the equivalent at that time of $2,308.12 in American dollars. The total claim presented in this action with interest amounts to $4,523.92. The plaintiffs en-
129 tered into negotiations with Natus for a compromise of said claim with the result that the differences between the parties

were composed at $3,416.02. Such settlement appears to be sound and in the best interests of the company and the shareholders, and is approved.

Many years prior to the outbreak of the Great War in Europe and continuously thereafter up to the period in November 1916, when the Russian government issued a decree forbidding all relations between Russian Nationals and German Nationals, the defendants Carl Otto von Hollitscher and Paul F. Gottlieb, doing business under the name of Heckscher & Gottlieb in Berlin, Germany, were agents and Managers of the Moscow Company. During this period as such managers and agents they transacted the business of the Moscow Company in Germany and elsewhere. They earned during this period of time substantial commissions from the Moscow Fire Insurance Company which have never been paid to Heckscher & Gottlieb.

After the Great War had been concluded and after the plaintiff Paul Lucke left Russia and entered Germany, he negotiated with Carl Otto von Hollitscher and requested that he and his firm render services to Moscow Fire Insurance Company looking to an adjustment and settlement of the many claims which were outstanding against the Moscow Company. These services were rendered in Germany and elsewhere and were of substantial benefit to the Moscow Fire Insurance Company and were performed at the request
130 of Paul Lucke who, under the circumstances was authorized to employ the firm of Heckscher & Gottlieb to render such assistance as was necessary to wind up the affairs of the Moscow Company in Continental Europe and Great Britain. Heckscher and Gottlieb have come into this action to recover payment for the commissions so earned, to also recoup certain balances, and to recover the value of the services rendered.

The claims which were advanced by Heckscher & Gottlieb were under three different headings:

1. Royal insurance commissions;
2. Marks claim;
3. Claim for services rendered.

The commissions which they were to receive related to that part of the Royal Insurance business which was reinsured with the Russian Reinsurance Company and retroceded by the Russian Reinsurance Company to Moscow Fire Insurance Company. The commissions agreed upon between the parties upon this business was at the rate of 5% and there can be no doubt that the weight of evidence clearly establishes that there is due upon this business to Heckscher & Gottlieb from the Moscow Fire Insurance at least the sum of $23,500 and were I called upon in this proceeding to make a finding with reference to this sum it would be in such amount.

Similarly, I would find against the claim of Heckscher & Gottlieb under the claim for the marks balance. It would seem that
131 there was owed Marks 7,312.58 to Heckscher & Gottlieb by the Moscow Company in the year 1919. It arose from certain

items originally charged by Heckscher & Gottlieb to Moscow Fire Insurance Company during prior years. Some of these items were in Dutch and Swedish currencies which were immediately converted into marks in the accounts between the parties. This balance was carried forward into the account and it is clear that other entries made in the accounts conclusively establish that by 1923 there was nothing owed to Heckscher & Gottlieb on account of any marks balance. On the contrary, it would appear that Heckscher & Gottlieb owed the Moscow Fire in Marks 128,000. Later, this amount was written off, the reason being that the mark had become so valueless that it could not be revalued into the new Reichsmarks then adopted as the new currency in Germany.

After having practically adjusted, balanced, or wiped out this claim upon their own books they could not revive it and seek to claim a claim in gold value for this old 1919 balance by specifically segregating it out of the accounts in an effort to give it individual vitality as a claim although it had been extinguished and merged in the adjusted balance.

The third branch of their claim relates to services rendered after the year 1920 in the adjustment of various claims which Moscow had against many insurance companies and which many insurance companies and agents had against the Moscow Company.

Lucke when he left Russia had very few papers or docu-
132 ments of his company with him. He might have had some general knowledge of the state of the various claims and accounts, but unless he was aided in some way he would have had very great difficulty in adjusting and settling these many claims which arose out of reinsurance treaties with the Moscow Company.

Lucke called upon Heckscher & Gottlieb to assist him, and Dr. von Hollitscher aided him in various ways. It is true Heckscher & Gottlieb were agents for the Moscow Company and owed some duty as agents to assist the plaintiff company and Lucke. The services which they rendered were apparently considered by Mr. Lucke as in excess of their obligations as agents and he supports their claim for services and agrees that the services which were rendered were valuable to the Moscow Company. But as to these further claims there is also no occasion for finally deciding them in this action for the reason that on June 21, 1921, Lucke, acting for Moscow Fire Insurance Company, entered into an agreement with Heckscher & Gottlieb to settle and compromise these claims against the Moscow Company for the flat sum of $30,000 payable as and when the money would be available for payment out of the American funds of the Moscow Company which are the subject of distribution in this action.

I am of the opinion that Lucke had the authority to make this adjustment; that the adjustment is reasonable and fair; and that considering the Royal claim for commissions to be allowed
133 at $23,500, the pay for services also allowed and included within the grand total of this settlement would be represented

by the sum of $6,500. This amount for the work done in England and Germany would not appear to be excessive. On the whole it would appear that the settlement was for the best interests of the company and it would seem that it should be allowed and enforced, but without interest, as the letters passing between the parties expressly provided that it is payable not only without interest, but at a future date, as and when the funds involved herein were available for its satisfaction and payment.

The defendant Assecuranz Union von 1865 is an insurance corporation of Cologne, Germany. Prior to the promulgation of the Russian decree of November 1916, which prohibited intercourse between Russian and German nationals, the Moscow Company had become reinsurer under various treaties of reinsurance made between the Moscow Company and German and Austrian companies, among others, the Aachen and Munich Fire Insurance Company, the Berlinische Fire Insurance Company and the Bavaria Insurance Bank Company, Ltd. When this decree of November 1916, was issued by the Russian Government it became necessary to substitute another company as reinsurer under these various treaties of reinsurance.

Accordingly, the defendant Assecuranz Union von 1865 was so substituted under an agreement and arrangement which provided that
the Assecuranz Union von 1865 would be reimbursed by the
134 Moscow Company for the net amount of any loss sustained
by the Assecuranz Union because of such substitution.

The proof establishes that there did result a loss to the said Assecuranz Union von 1865. This loss is represented by the amount paid by the Union on or prior to July 1, 1927, the date of the last entry in the Assecuranz Union accounts with the Moscow Fire Company. The items were represented by different classes of currency as follows:

Reichsmarks	495.23
Dutch florins	2,681.25
Swedish Kronen	7,329.27

Inasmuch as these amounts were carried by the Assecuranz Union in a running account the rate of exchange should be taken as of the time when the account came to an end, rather than, as contended by the claimant, that the rate of exchange should be taken as of each date that the money became due under the contract. In other words, the proper holding should be that the cause of action arose on July 1, 1927, and the rate of exchange should be fixed accordingly at the date of breach, exclusive of interest (Gross v. Mendel, 171 App. Div. 237; aff'd 225 N. Y. 633; Hoppe v. Russian Asiatic Bank, 253 N. Y. 37; Park v. Hoppe, 257 N. Y. 333, 341; 258 N. Y. 365).

On this basis as of July 1, 1927, the indebtedness represented by these various currencies converted into dollars was the equivalent of $3,155.12 in United States currency.

The claimant Bazile Gartoung was, in 1918, assistant man-
135 ager of Moscow Fire Insurance Company, under a written
contract of employment dated February 10, 1916. This con-

tract entitled him to the sum of 14,000 rubles for each of the years 1919 and 1920. He was also entitled to receive certain sums representing a commission based upon profits resulting from the business of the company for the year 1918.

The claimant entered upon the performance of his duties and continued the performance thereof satisfactorily up to April 1, 1919, the time of the completion of the liquidation of the company by the Soviet Government. He received his salary up to the end of the year 1918. He did not receive any part of the special compensation or bonus for the year 1918 which is referred to in paragraph 4 of the agreement, nor did he receive any salary after 1918, equivalent to 4,000 rubles. The plaintiffs entered into negotiations with the claimant Gartoung for adjustment of this claim in the aggregate of 32,000 rubles with interest thereon from January 1, 1919, and have entered into a compromise of the same at the flat sum of $3,500. This compromise is fair and is in the interest of the stockholders and it is therefore approved.

The defendant, Vladimir A. Miller, a former Russian lawyer, now a resident in Paris, France, in the year 1923 was engaged by the plaintiff Paul Lucke to assist him in guarding and protecting the assets and the affairs of the plaintiff company. From that time down to the present time he has been engaged in the rendition of substantial and beneficial services to the Moscow Company,
136 both in connection with the affairs here in the United States as well as the liquidation of the company's affairs in Europe outside of Russia. In 1924 he entered into an agreement with the Moscow Company whereby he was to be compensated for the services which he rendered under his employment agreement at the rate of $1,000 a year, and in addition he was to receive a 1½% commission upon the United States surplus, that is to say, his commission was to be calculated on the same basis as that under a similar contract which the company had made with Messrs. Campbell & Whipp, but at a different percentage. It is clear that the intention of the parties in making this agreement was that the contingent commission which Miller was to receive, based upon the percentage agreed upon was to be calculated upon the total surplus of the United States branch remaining in favor of the Moscow Company after the payment of American policyholders and creditors and exclusive of foreign attachment claims.

Any argument directed as to what is the true surplus of the company and whether in order to ascertain the same, foreign attachments should be deducted is wholly aside from the question here involved, which is one requiring a determination as to the basis upon which these parties agreed.

The United States surplus of the said Moscow Company remaining after the payment of United States policyholders and creditors and before payment of foreign attachment claims amounted to $1,665,054.76. The contingent percentage of 1½% thereon to which

the claimant is entitled therefore amounts to $24,975.72, and
137 according to the agreement of the parties bears interest from August 11th, 1931, the date of the entry of the order of the Supreme Court entered upon the remittitur sent down by the Court of Appeals, which fixed the total United States surplus funds. The proof establishes that Miller has been paid on account of his fixed compensation of $1,000 a year, the sum of $673.31, which is the dollar equivalent of 16,000 French francs paid to him between September 1924 and October 1933. Accordingly, the claimant Miller is entitled to recover the sum of $34,975.82, reduced by $673.31, leaving a balance of $34,302.21 owed to him, together with interest on $24,975.82 from August 11, 1931, and interest upon each unpaid $1,000 balance from its due date.

While the defendant Miller was engaged in assisting Lucke in Europe for the purposes just indicated, another Russian lawyer, the defendant Michael Imchanitzky was similarly engaged by Lucke and sent to the United States to assist there in closing the affairs of the Moscow Company. This defendant, also a Russian lawyer, rendered substantial services as Russian counsel from August 11, 1931, down to the present time. These services were rendered partly here and partly abroad and no specific arrangement was made with him, his compensation being left to a quantum meruit payment. When the question of his compensation came up, the matter was discussed and Mr. Lucke on behalf of the Moscow Company and the defendant Michael Imchanitzky agreed between them that up to the commencement of the reference that he should receive
138 $8,000 in full payment of all claims up to that point, the adjustment being based on $6,000 for services and $2,000 for disbursements necessarily incurred by him for the benefit of the Moscow Company. In addition to this amount, which was thus adjusted between the parties, the claimant has established in the hearings before the Referee that he rendered further services to the plaintiffs during the period covered by the present reference and his claim as to this is left for determination by the Referee. The proof here establishes that the fair and reasonable value of these services is $3,750, and the defendant is accordingly entitled to recover this sum in addition to the $8,000 as adjusted.

In the year 1920, Paul Lucke left Russia. For a long period of time he had been general manager and director of the Moscow Fire Insurance Company. His father also had been general manager of the company before him. When he left Russia several other directors left about the same time and went into other parts of Europe. By the time the liquidation was completed and in 1931 the Court of Appeals determined the disposition of the surplus of the company, Paul Lucke was the sole surviving director of the Moscow Company and was, by the terms of the decision of the Court of Appeals in this case, made the conservator of assets and surplus of the company down to the present time. Mr. Lucke has been engaged

from 1920 to this date in continuous and arduous services in adjusting and settling the affairs of the Moscow Company in Europe as well as in the United States. The services which he rendered
139 to the company were surrounded with many difficulties and they were most loyally rendered. It was indeed fortunate that a man with his intimate knowledge of the affairs of the company and the personnel of its shareholders has been available to present to this court the picture that he has given, otherwise the tangled affairs of this company would have been most difficult of any satisfactory solution.

When he left Russia he naturally left with very few records of the company. Most of the records had been taken over by the Soviet Government. In the course of the subsequent years these records were stored in confusion in various parts of Russia and many of them had been destroyed, as the history of these records developed in the course of the Russian insurance litigation in this state attests. Notwithstanding the difficulties which surrounded his investigations and his services he entered upon a thorough and exhaustive investigation of the numerous claims through which he has surmounted many of the hurdles which beset his progress. The investigations which he conducted related to an ascertainment of assets abroad and of the liabilities of the company under existing obligations arising under outstanding treaties of reinsurance or contracts which obligated the company as a direct writing company. Through the aid of Mr. Miller and the intelligent support of Frederick B. Campbell and Paul C. Whipp, aided by Mr. Imchanitzky, Mr. Lucke worked out a settlement and adjustment of a number of claims against the company existing in various parts of Europe outside of Russia
140 and accomplished very satisfactory and praiseworthy results in all of his endeavors.

For these services he has presented in this action a claim for compensation. While he was of the opinion that his services were worth to the company $10,000 per year, in interposing his claim he asks only to be compensated at the rate of $7,500 per annum. Certainly in the light of his zealous and laborious efforts this annual stipend ought to be considered a very moderate obligation for the company to satisfy. Lucke has rendered services in Russia, in Continental Europe, in Britain and in the United States from the beginning of 1919 up to the present time. At the rate of $7,500 per year, the total amount asked for by him would aggregate $116,000.

During the course of his activities in Russia certain funds came into his hands as surviving director of the company and out of these he paid to himself on account of his compensation and for living expenses the sum of $56,000. Crediting this claim with this amount received there remains a further sum of $60,000 due him for these services, which he surely is well entitled to receive. In the course of the hearings he presented an account to this court in which are detailed the monies received by him and the disbursements which

he made on account of the Moscow Fire Insurance Company as of May 1, 1934.

This account sets out all of his receipts and disbursements. The total receipts in dollars was $80,923.94 against which he expended $78,078.35 as follows: $10,078.35 for payments to employees,
141 $12,000 for traveling expenses and $56,000 on account to himself as above stated. The total amount of francs which he rereceived was 365,879.17 against which he expended 256,023.15 as follows: payments to creditors, 37,574.40; legal expenses, 49,205.60; traveling expenses, 60,578.35; miscellaneous expenses, 65,486.63, and as advances for account of indigent shareholders, 43,178.18. After these expenditures there remained in his hands on May 1, 1934, $2,845.59, 109,856.01 francs, and £490.5.3. These funds are to be held by Mr. Lucke for the purposes of the Company and for which he of course shall be held accountable in the future.

Naturally, surrounded as he is with the difficult problem of adjusting the affairs of the company, he has had to expend for the general benefit of all many sums in investigation which related, as events turned out, to individual cases and individual benefit. But the expenditures were necessarily made with the hope of ascertainment of the whereabounts of all of the shareholders so that they might all be brought before the court with a view to adjusting their rights. Naturally, it was difficult for him, an exile of Russia, to deal with a new government in Russia which was hostile to him and to men of his type who had been leaders under a capitalistic system which the Soviet ideals had abolished. They had established a new and different form of government which was also hostile to a distribution in accordance with individual ownership and our principles of
142 justice. Clearly whatever charges he made in his investigations are properly general charges against the fund at this time. It may be that any expenditures which shall be hereafter made shall be made only for the benefit of individual shareholders and chargeable against any liquidating dividend later received by such shareholders on account of any holdings. Many of the shareholders whose rights to the liquidating dividend are hereinafter referred to and determined have expended against their prospective liquidating dividend monies necessary for procuring documents and certifications essential to their proof, without asking the general fund to first reimburse them, though these shareholders have in turn, by virture of the manner in which the investigation has been conducted up to now, been proportionately benefitted through the discovery and presentment of all claims investigated through the efforts of Mr. Lucke.

Considerations of equity however woud seem to require that as to the future if charges are made they should be made against particular shareholders' rights. These considerations also require that there will be repayment to the company out of the liquidating dividend received by shareholders any advances made to these shareholders which

appear in the account of Paul Lucke as having been made to these shareholders while in need as indigent shareholders.

A further claim against these surplus assets of the plaintiff company has been presented by Frederick B. Campbell and Paul C. Whipp, members of the bar, who have been employed by and
143 have rendered valuable legal services to the plaintiffs, Moscow Company and Paul Lucke as conservator of its funds since August 11, 1931, down to April 19, 1933, the date when this action was begun. These claimants are seeking compensation for these services in this action and have presented proof establishing that the fair and reasonable value of services rendered is $17,500. The amount asked is, in my opinion, entirely reasonable and fair, since, for the services rendered to the Company these attorneys in my opinion could have justly asked and been allowed a larger compensation. In addition to owing these attorneys for services rendered the Company is under further obligation for a balance to them for disbursements made on account of plaintiffs. These disbursements aggregate $1,614.33, against which $1,239.34 was paid, leaving a balance of $374.99 owed for disbursements by plaintiffs to these claimants. The claims of Messrs. Campbell & Whipp are therefore allowed.

The claimants, Lorantz & Kresche, a stock company of Zgierz, Poland, were holders of fire policy No. 64830 which insured certain property of the stock company against fire loss in the sum of 12,125 rubles, said insurance policy being dated April 15–28, 1914. There were other policies outstanding covering fire losses against the property of this company as follows:

Policy No. 65219—42,699 rubles, dated June 15–28, 1914; Policy No. 65217, dated the same date, for 37,500 rubles; Policy No. 64210, dated October 29–November 11, 1913, for 20,299 rubles.
144 The claimant while the policies were in force suffered a fire loss and became entitled to compensation on account of the same under these various policies of insurance. There was evidence that this loss was found in favor of the claimants by judgments of the District Court in Warsaw, Poland, dated November 20–25, 1933, and a further judgment in the same court dated May 28–June 4, 1934. The plaintiffs negotiated for a settlement of this claim and agreed that $20,000 should be paid as a flat sum in settlement thereof. This settlement and adjustment is considered fair and is approved.

The proof in this case shows that there are no further claims existing or outstanding against the Moscow Fire Insurance Company except as they have been hereinafter stated.

The complaint in this action alleges in addition to the claims hereinbefore discussed a claim of Bertram Aymar Cater of London, England, for services and disbursements as representatives of the Moscow Fire Insurance Company in connection with negotiations and management of the reinsurance business in London of the plaintiff company and the closing of its English branch. The amount of this claim is alleged at the sum of $21,000. No proof was presented during the hearings in support of this claim. There was

likewise presented during the hearings a claim of Elizabeth Buttmann, widow of an employee of the Moscow Fire Insurance Company who died on January 5, 1911, and who was granted a
145 pension of 450 rubles per annum, which was unpaid since 1917.

It was asserted on behalf of the Moscow Fire Insurance Company that it never paid any pensions to its employees and that there was a separate corporation regularly organized under the laws of Russia which handled pensions of Moscow Fire Insurance Company and that therefore the plaintiff company was not liable at all for any compensation claimed. It was asserted also that the employees as well as the company contributed to this fund and that when the assets of various companies were confiscated by the Soviet Government the assets constituting this fund were seized and confiscated and all means whereby any claims similar to that of this claimant could be compensated were lost. The attorney for this claimant indicated that his own subsequent investigations confirmed the assertions of the plaintiff.

The summons in this action has been served either personally or by publication upon all of the defendants in this action which is brought in rem for the distribution of these funds. The action is a class action, brought for the benefit of all shareholders of this corporation and for a distribution to them of their respective distributive shares of the net surplus left after the payment of claims and expenses against these funds. In such type of action this Court has power to issue process the service of which will effectually bar the rights of those who fail to appear and present claims against, or rights in a fund (Pennoyer v. Neff, 95 U. S. 679; Manson v. Williams, 213 U. S. 453, 455).

146 The judgment to be entered in this action is to have provision made therein for further applications at the foot of the judgment. By this provision, in addition to the interim payment which is provided for herein, all shareholders who are presently known may hereafter receive their entire distributive share and the balance may be held by the defendant trust company and the plaintiff conservator until the claims of unknown shareholders are ascertained and established from time to time and paid out pursuant to the orders at the foot of the decree.

As indicated above, at the time the plaintiff Paul Lucke left Russia, he took with him a shareholders list which was the list used by the company at its last annual meeting of creditors which was held on April 11, 1917. This list was revised down to November 15, 1918, and was in evidence in this action. In November 1918, prior to the Russian decree of December 1, 1918, which terminated the business of the plaintiff company in Russia, there were 579 shareholders of record, each owning and holding the respective shares appearing opposite their names on this shareholders list. Their total holdings aggregated 10,000 shares, or the total number of shares of the company issued and outstanding. Out of this total

of shareholders only 140 living and 14 who have assigned their shares have appeared in this action. In addition to these, approximately 100 shareholders who have died are represented in this action and proof as to their respective rights is before the court. These shareholders represent however an ownership of approximately 6,500 shares.

147 The total amount of claims allowed by me as above indicated aggregates approximately $206,950.64. The total surplus on hand is $1,136,879.54. There will, of course, be further expenses against this fund to be paid by the depositary as well as such allowances and costs as may be awarded. Further expenses may possibly be general charges against the fund, or may be chargeable solely against individual distributive shares. At the present time, however, it is easily possible to set aside $436,879.54 to meet all the present claims of creditors and any future claims which may be presented after publication for the same. This sum thus set aside will also be sufficient to provide for expenses, allowances, and costs. Out of the remainder it is feasible and proper at this time to distribute to known shareholders, assignees, and representatives and successors of deceased shareholders the sum of $700,000 to be distributed pro rata to those entitled in the proportion of $70 for each share issued and outstanding, and a like amount to be set up and held for proof of ownership of each unknown shareholder.

The findings will indicate what shareholders are known and classify those who are living and who have assigned their rights and interests in shares and those who are dead and those who represent them either by way of provision made under a will or as next of kin and heirs at law. Awards are made to these in accordance with the proof.

148 These payments should be made by the depositary to these shareholders or to their attorney in fact whose right to receive the same has been established in the proof, except in the case of shareholder No. 260 shown on the Russian list of shareholders, Credit Lyonnais, whose distributive share in the liquidating dividend would equal $2,560. This payment should be withheld and charged with an offset in favor of the Moscow Fire Insurance Company which it is claimed will exceed this sum of money. Eventually, if it is established that the Moscow Company is entitled to withhold this entire amount as an offset, it will fall into the surplus to be distributed pro rata to all shareholders in accordance with their respective holdings.

The findings submitted to me have been passed upon and, if desired, a formal or engrossed decision may be presented for signature upon which the clerk will then enter a decree.

149 In United States District Court, Southern District of New York

[Title omitted.]

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Valerian E. Greaves, being duly sworn, deposes and says:

1. I am a consultant on foreign law with an office at 2 Rector Street, Borough of Manhattan, City of New York.

2. I was born in the Empire of Russia in 1876 and I continuously resided there until June 1918. I was graduated from the Imperial Law School of Russia with highest honors. Upon graduation I served two years as secretary to the Attorney General of Siberia and one year as secretary of a Committee appointed to liquidate penal deportation to Siberia. Subsequently, I joined the Bar
150 and practiced law as a notary of the Supreme Court at St. Petersburg from 1903 to 1918. I served as a member of a committee appointed to draft a new Civil Code for the Russian Empire (subsequently adopted by the Soviet Government as a basis of the Soviet Civil Codes). I served as a member of the Juridical Council of the Provisional (Kerensky) Government of Russia in 1917, which was a body consisting of nine members chosen from the Justices of the Supreme Court of Russia, professors and practicing attorneys, to advise the government on legal matters and on the constitutionality of its decrees.

3. Since 1921, I have been a consultant on foreign and international law in the City of New York. I have been continuously engaged in the study and advisory practice on matters of Soviet law. I am a member of the Committee on Foreign Law of the Bar Association of the City of New York and as such I have been specifically engaged in the examination of questions of Soviet law on which I have prepared several articles for the Bar Association. I am a member of a committee appointed by the Section of International and Comparative Law to report to the 1934 annual convention of the American Bar Association on the essential features to be included in the proposed commercial treaty of the United States with the Union of Soviet Socialist Republics, and as a member of such committee have prepared several papers for the committee report. I acted as leader at a conference on Soviet Law at a meeting of the Section of International and Comparative Law of the American Bar Association.

151 4. In the course of my professional and scientific studies of Soviet Law, I have become familiar with the Soviet law concerning the nationalization of insurance and other private business enterprises and in my opinion I am able now to state the correct application of Soviet law to insurance enterprises.

5. I have examined a decree of the Council of People's Commissars "on the organization of insurance business in the Russian Republic", dated November 28, 1918, published in the "Izvestiya of the All-Russian Central Executive Committee of Soviets" (official newspaper), No. 263, on December 1, 1918, and subsequently republished in the Collection of Decrees and Orders concerning the National Economy, Volume 2, pages 720, 721, a copy of which is attached to the affidavit of Edward J. Ennis in support of the order to show cause herein. The said decree is a duly enacted law of the Soviet Government and as such went into full force and effect on the date of its publication.

6. The said decree expressly proclaimed insurance in all its aspects and forms to be henceforth a State monopoly, and all private insurance companies and organizations, whether stock or mutual to be subject to immediate liquidation (with the exception of cooperative organizations engaged in mutual insurance of movable property and merchandise). The assets of all of the said private insurance companies and organizations were declared to be the property of the Soviet State by a special provision of the said decree pro-
152 claiming that all assets of said private insurance companies outstanding upon liquidation became property of the Soviet State. It is my opinion, based on the express text of the said decree and my knowledge of the Soviet legal terminology that the said decree declared all assets of the private insurance organizations which were subject to liquidation to be the property of the Soviet State. The expression in the Russian text of the said decree "vse imustchestva", equivalent to the English expression "all properties", comprises all assets without exception regardless of what they may consist and where they may be located and extends to all tangible things outside of Soviet territory and choses in action including those against foreign debtors.

7. Neither the said decree, nor any other law, decree, instruction, interpretation, or other enactment of the Soviet Government contains any provision indicating that the Soviet Government originally intended to exclude or subsequently excluded from the operation of the said decree any assets of private insurance concerns referred to in the said decree including assets outside of Soviet territory.

VALERIAN E. GREAVES.

Sworn to before me this 24th day of September, 1934.

ARMAND CHANKALIAN,
Notary Public, New York Co.

Clerk's No. 387, Reg. No. 5C463.
Commission expires March 30, 1935.

153 In United States District Court, Southern District of New York

Notice of filing of documents, in support of motion to dismiss complaint

[Title omitted.]

SIR: Please take notice that, upon the argument herein, the defendant will file with the Court (a) a copy of the annexed photostat copy of the proof of claim filed by complainant with James F. Donnelly, Esq., the Referee in the State Court proceedings, and affidavit relating thereto; and (b) letter from the Secretary of State dated September 24, 1934, and authenticated copy of letter referred to therein, copies of which are annexed hereto.

Dated, New York, October 2, 1934.

Yours, etc.,

EMMET, MARVIN, & MARTIN,
Solicitors for Defendant,
Office and P. O. Address, 48 Wall Street, New York City.

To MARTIN CONBOY, *Esq.*,
U. S. District Attorney,
Solicitor for Complainant.

154 *Affidavit of Frederick B. Campbell, verified October 2, 1934, attached to notice of filing documents*

United States District Court, Southern District of New York

IN EQUITY 78/377

UNITED STATES OF AMERICA, COMPLAINANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

FREDERICK B. CAMPBELL, being first duly sworn, deposes and says that he is of counsel for the defendant; that, in deponent's affidavit, verified September 11, 1934, submitted herein, reference is made to a proof of claim filed on behalf of the complainant U. S. on August 13, 1934, with the Referee in the State Court proceedings, James F. Donnelly, Esq., a typewritten copy of which proof of claim was attached to deponent's said affidavit as Exhibit A.

There is herewith submitted to the Court a true photo-
155 static copy of such proof of claim showing, over the signature of said Referee, the filing thereof.

FREDERICK B. CAMPBELL.

Sworn to before me this 2nd day of October 1934.
[NOTORIAL SEAL]

L. D. BATES,
Notary Public, Kings County.

Clerk's No. 274, Register's No. 6314.
N. Y. Co. Clks. No. 780, Reg. No. 9–B–439.
Queens Co. Clks. No. 421, Reg. No. 2290.
Commission Expires March 30, 1936.

Copy of proof of claim printed hereinbefore as exhibit A attached to affidavit of Frederick B. Campbell, verified September 11, 1934, attached to notice of filing documents with endorsement "rec'd Aug. 13, 1934, by W. Gold at 11:50 a. m., James F. Donnelly, referee."

156 *Document, dated September 24, 1934, attached to notice of filing documents*

DEPARTMENT OF STATE,
Washington, September 24, 1934.

In reply refer to EE.
MESSRS. CAMPBELL AND WHIPP,
20 Exchange Place, New York City.

SIRS: In response to the request contained in your letter of September 18, 1934, there is enclosed a certified copy of the letter addressed to Mr. Boris Bakhmeteff, Ambassador of Russia, by the Secretary of State, the Honorable Charles E. Hughes, on April 29, 1922.

Mr. Boris Bakhmeteff was formally received by the President of the United States as the duly accredited Ambassador Extraordinary and Plenipotentiary of Russia to the United States on July 5, 1917. Mr. Bakhmeteff was recognized as Russian Ambassador until June 30, 1922.

Very truly yours,
For the Secretary of State:

R. WALTON MOORE,
Assistant Secretary.

Enclosure: Certified copy of letter to Mr. Bakhmeteff, April 29, 1922.

157 *Document, dated April 29, 1922, attached to notice of filing documents.*

APRIL 29, 1922.

MY DEAR MR. AMBASSADOR: I have received your letter of April 28, 1922, in which you bring forward the question of your status as Ambassador in the United States and suggest that it may be appropriate to have this terminate in the near future, inasmuch as the liquidation

and final settlement of the business of the Russian Government in the United States for which you were responsible is now practically completed, and as your continuance as Ambassador under the existing circumstances may give rise to misunderstanding.

I believe that a change in the present situation is desirable, and I am glad to be able to concur in your suggestions as to how this may best be brought about.

You will continue to be recognized as Ambassador until June 30 next. After this date the custody of the property of the Russian Government in this country for which you have been responsible will be considered to vest in Mr. Serge Ughet, the Financial Attaché of the Embassy. Mr. Ughet's diplomatic status with this Government will not be altered by the termination of your duties, and he will continue to enjoy the usual diplomatic privileges and immunities.

With assurance of my high esteem and appreciating the
158 friendly spirit in which you have dealt with all matters of interest to this Government, I am, my dear Mr. Bakhmeteff,

Very sincerely yours,

CHARLES E. HUGHES.

701.6111/590.

His Excellency, Mr. BORIS BAKHMETEFF,
Ambassador of Russia.

In United States District Court, Southern District of New York

[Title omitted.]

Answering affidavit of Edward J. Ennis, verified October 4, 1934

STATE OF NEW YORK,
Southern District of New York, ss:

Edward J. Ennis, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in charge of the above-entitled suit.

159 2. I have read the affidavit of Frederick B. Campbell verified October 2, 1934, and the notice that upon the argument herein the defendant will file with the court a photostat copy of a proof of claim filed with the referee in the state court proceeding and the brief of the defendant herein, served October 2, 1934, particularly that part of the brief entitled "As to the Proceedings of the Complainant U. S. in Such State Court Suit" (pp. 32–34), in which it is stated that my affidavit in support of the order to show cause herein makes no mention of a proof of claim filed with the referee in the state court proceeding. The facts concerning the proof of claim and the reason why it was not mentioned in my affidavit in support of the order to show cause are hereinafter stated.

3. On August 9, 1934, I attended a hearing before the referee in the state court proceeding to learn whether or not it was presently

proposed in that proceeding to pay any claims out of any funds in which the U. S. S. R. had an interest prior to November 16, 1933, and which the U. S. S. R. assigned to the United States on that date. I was informed by the referee that he was about to sign and file a report in the state court proceeding recommending distribution of the fund held by the defendant herein to creditors and stockholders of the Moscow Fire Insurance Company.

4. On August 13, 1934, I left at the private law offices of
160 the referee a proof of claim, a copy of which is attached hereto, stating that the United States claimed the entire fund held by the defendant.

5. On August 13, 1934, an appointment with the referee was arranged by telephone for August 14, 1934, for the purpose of discussing any claim that might be made by the United States to the fund held by the defendant. There was no statement or understanding that the appointment on August 14, 1934, would constitute a hearing in the state court proceeding. No notice of such a hearing in the state court proceeding was given to me. The statement in my affidavit verified August 22, 1934, in support of the order to show cause herein that I attended a "hearing" before the referee on August 14 refers to the appointment and meeting hereinafter described.

6. On August 14, 1934, I kept the appointment at the office of the referee in company with Mr. Horan and Mr. Spencer, Assistant United States Attorneys for the Southern District of New York. There were also present several attorneys for various parties to the state court proceeding including Messrs. Campbell and Whipp, attorneys for the plaintiffs in the state court proceeding, Mr. Cabell, attorney for creditors in the state court proceeding and Mr. Fraenkel, attorney for certain stockholders in the state court proceeding. The referee stated that he had invited as many attorneys of parties in the state court proceeding as he could communicate with on short
161 notice, including the attorneys there present, to be present at our discussion of the rights of the United States in the fund held by the defendant. The appointment or discussion was not convened as a hearing in the state court proceeding and it appeared that no record of the discussion was kept. The meeting is not referred to as a hearing in the report of the referee dated August 21, 1934, which states on page 3 thereof (Exhibit B attached to affidavit of John C. Vedder in opposition) the dates upon which hearings were duly held before the referee and mentions August 9, 1934, as the date of the last hearing.

7. During the discussion on August 14, 1934, the referee stated that he would not recognize or consider the proof of claim left at his office on August 13, 1934, and that by the order of the state court appointing him as referee to hear and determine the issues in the state court proceeding he could only consider issues referred to him by the state court and that the United States could assert a claim

in the state court proceeding only by filing an answer or otherwise intervening in the state court proceeding and creating an issue which could be referred to him as referee under the order of his appointment to hear and determine issues created in the state court proceeding. The referee stated that he would not mention or in any way refer to the said proof of claim in the report he was about to make to the state court upon claims properly before him in the state court proceeding.

8. During the discussion on August 14, 1934, the attorneys
162 for the parties in the state court proceeding there present stated that they would not consent or agree to any consideration by the referee of the proof of claim but that they would require the United States to present its claim in the state court proceeding by application to the court.

9. Mr. Horan suggested that the United States might wish to assert an interest in the fund held by the defendant but that he was not presently authorized to state in what forum or in what manner that interest would be asserted.

10. The referee stated that he desired to give the United States a reasonable opportunity to determine whether or not it would assert any claim against the fund.

11. It was agreed and understood by all the parties present at the discussion that the referee would withhold his report which he was about to file for one week and until August 21, 1934, and that in the intervening period the United States would determine in what manner it would assert its rights, whether by intervention in the state court proceeding or by suit in this court.

12. On August 22, 1934, the referee filed his report in the state court proceeding and made no mention whatever of the proof of claim or of the discussion of August 14, 1934.

13. On August 22, 1934, my affidavit in support of the order to show cause herein was verified and no mention was made
163 of the proof of claim in the belief that the referee and all of the parties present at the discussion on August 14, 1934, understood and agreed that the proof of claim had been ignored by the referee and was entirely nugatory and ineffectual and did not constitute an appearance or a pleading in or any part whatsoever of the state court proceeding and was entirely immaterial and irrelevant to a full statement of the facts of the pending state court proceeding.

14. The opposing affidavit of Frederick B. Campbell verified September 11, 1934, to which is annexed a copy of the proof of claim, states at page 6 thereof that at the discussion on August 14, 1934, the referee stated "that he would withhold his decision in said suits for one week to allow time to the United States to take such steps as it should deem advisable with reference to such proof of claim." As stated above the facts are that it was understood that the proof of

claim was considered by the referee and counsel present to be entirely ineffectual and that it would not be considered by the referee in any event.

EDWARD J. ENNIS.

Sworn to before me this 4th day of October, 1934.

JOHN V. B. MERRITT,
Notary Public, Westchester County.

Cert. filed in N. Y. Co. Clk's No. 637.
Commission expires March 30, 1935.

164 *Exhibit A—Copy of proof of claim attached to answering affidavit of Edward J. Ennis, verified October 4, 1934*

(Printed hereinbefore as Exhibit A attached to affidavit of Frederick B. Campbell, verified September 11, 1934.)

In United States District Court, Southern District of New York.

E. 78–377

UNITED STATES OF AMERICA, COMPLAINANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT

E. 78–383

UNITED STATES OF AMERICA, COMPLAINANT

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSOR to The Bank of Manhattan Trust Company, defendant

Appearances: Martin Conboy, U. S. Attorney, Solicitor for the Plaintiff in both cases (Martin Conboy, Francis H. Horan, Edward J. Ennis and Paul A. Sweeney, Esqs., of Counsel).

165 Messrs. Emmet, Marvin & Martin, solicitors for defendant Bank of New York and Trust Company (Frederick B. Campbell, Paul C. Whipp, and Lounsbury D. Bates, Esqs., of counsel).

Messrs. Rumsey & Barker, solicitors for defendant president and directors of the Manhattan Company (Wendell P. Barker, Robert J. Sykes, and W. C. Morris, Esqs., of counsel).

Messrs. Charles B. Alling, Hartwell Cabell, Coudert Brothers, John M. Downes, Engelhard, Pollak, Pitcher, Stern & Clarke, Borris M. Komar, Rosenberg, Goldmark & Colin and Samson Selig, representing various interests, filed briefs amici curiae in opposition to the motions of the Government and in support of the motions of the defendants to dismiss.

Opinion

Filed Nov. 30, 1934

COXE, *D. J.*› In these suits the United States seeks to establish title to the remaining New York assets of Moscow Fire Insurance Company and Northern Insurance Company, two Russian insurance corporations which were dissolved in 1918 by decrees of the Soviet Government. These Companies formerly maintained branches in this country, and upwards of eight years ago the New York assets of both companies were taken over by the New York Superintendent of Insurance in liquidation proceedings under the New York Statute.

The Superintendent's liquidation was completed prior to 1933, and in that year the remaining assets of the Moscow Com-
166 pany were turned over, under a State court order, to the defendant Bank of New York and Trust Company "as agent or depositary" of the Moscow Company, subject to withdrawal only on the "order of a Court of competent jurisdiction." The same disposition was made of the remaining assets of the Northern Company, except that the depositary in that case was the Bank of Manhattan Trust Company, predecessor of the defendant President and Directors of the Manhattan Company.

The Northern Company had previously made an assignment for the benefit of creditors to the defendant President and Directors of the Manhattan Company, under the New York statute, and, by a later order of the State court, the transfer of the assets of the Northern Company to that Company, as assignee, was authorized and approved.

The funds of the two companies are now held by the defendant Banks, awaiting distribution among the persons entitled to share in the funds, respectively.

Recently proceedings were started in the State courts, on notice to all parties interested, to secure distribution of the two funds, and these proceedings have proceeded in the case of the Moscow Company to judgment, and, in the case of the Northern Company, to a consideration of the claims presented.

The complaints in the two suits are substantially alike, and allege that the funds of the two companies, now held by the defendant Banks, were "confiscated and appropriated" by the "Russian
167 State" in 1918, and that title to both funds was assigned to the United States by the "Russian State" on November 16, 1933. The prayer for relief in each case is for an accounting and a direction to turn over the fund to the United States.

The present motions are by the Government in each case for an injunction pendente lite, restraining distribution of the fund; and by the defendant in each case for a dismissal of the complaint for insufficiency.

The principal contentions urged by the defendants in support of the motions to dismiss are (1) that our courts will not enforce the Soviet decrees of confiscation over property located here, and which has always been located here; and (2) that no title or interest in or to the funds of the two Companies now held by the defendant Banks has been or could be assigned or transferred to the United States by the Soviet Government.

The legislation of any nation has no extraterritorial force as a matter of right. Rose v. Himely, 4 Cranch, 241; The Apollon, 9 Wheat., 362; Hilton v. Guyot, 159 U. S. 113; Second Russian Ins. Co. v. Miller, 297 Fed. 404, affd. 268 U. S. 552. The extent to which such legislation will be recognized by other nations depends on comity. The Bank of Augusta v. Earle, 13 Peters, 519, 589; Second Russian Ins. Co. v. Miller (supra). Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U. S. 113, 164.

168 The courts of this country will not, however, enforce the laws of foreign nations which are contrary to our own public policy: The Bank of Augusta v. Earle (supra); Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149; Vladikavkazsky Ry. Co. v. N. Y. Trust, 263 N. Y. 369; and the public policy of the United States is to be determined "from the Constitution and the laws, and the course of administration and decision"; License Tax Cases, 5 Wall 462, 469; "not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public." Hartford Fire Ins. Co. v. Chicago, 70 Fed. 201, 202.

The confiscatory decrees of the Soviet Government were clearly opposed to the public policy of the United States. Russian Volunteer Fleet v. U. S., 282 U. S. 481, 491, 492; Petrogradsky M. K. Bank Co. v. National City Bank, 253 N. Y. 23; Vladikavkazsky Ry. Co. v. N. Y. Trust, 263 N. Y. 369; Baglin v. Cusenier, 221 U. S. 580. They were utterly ineffective to reach the properties of the Moscow and Northern Companies in this country; Vladikavkazsky Ry. Co. v. N. Y. Trust (supra); Baglin v. Cusenier (supra); The Jupiter, 96 L. I. P. 62 (1927); Employees Liability v. Sedgwick, 1927, A. C. 95; and the subsequent recognition of the Soviet Government in no way changed the confiscatory nature of the decrees insofar as these particular funds were concerned. Lehigh Valley v. State of Russia, 21 Fed. (2) 396, 401; Vladikavkazsky Ry Co. v. N. Y. Trust (supra).

It is insisted on behalf of the United States that the Soviet Government became the "liquidator" of the assets of the two dis-
169 solved Russian insurance companies, and that a liquidator's title will be accorded recognition in our courts. The difficulty with this contention is that the complaints allege specifically that

the properties of the two companies were "confiscated and appropriated" by the Soviet Government. However, it is perfectly clear that the liquidation of a corporation implies winding up and distribution of the assets among the creditors and stockholders: Lafayette Trust Co. v. Beggs, 213 N. Y. 280, 283; Matter of Silkman, 121 A. D. 202; and it is nowhere suggested that the two funds in question were assigned to the United States for any such limited purpose as counsel intimates.

I am satisfied, also, that no assignment or transfer of the two funds was ever made to the United States by the Soviet Government. The instrument relied on to support the alleged assignment is the letter of Mr. Litvinoff, People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, to the President of the United States, dated Nov. 16, 1933; reading as follows:

"MY DEAR MR. PRESIDENT: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Government of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union
of Soviet Socialist Republics will not take any steps to en-
170 force any decisions of courts or initiate any new litigations for
the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment."

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to—

"(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of
the United States, or public officials in the United States, or
171 its nationals, relating to property, credits, or obligations of
any Government of Russia or nationals thereof."

"I am, my dear Mr. President,

"Very sincerely yours,

"MAXIM LITVINOFF,
"*People's Commisar for Foreign Affairs,*
"*Union of Soviet Socialist Republics.*

"MR. FRANKLIN D. ROOSEVELT,
"*President of the United States of America,*
"*The White House.*"

Under the express terms of this letter, the assignment to the United States was of "the amounts admitted to be due or that may be found due it (i. e., the Soviet Government), as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, * * *."

The funds held by the defendant Banks for the Moscow and Northern Companies were in no sense due the Soviet Government from "American Nationals." They belonged to the two dissolved insurance companies, which were given juristic standing in the New York courts by repeated decisions of the Court of Appeals. Petrogradsky M. K. Bank v. National City Bank, 253 N. Y. 23; Matter of People (Russian Reinsurance Co.), 255 N. Y. 415; Matter of People (Northern Ins. Co.), 255 N. Y. 433. Moreover, the defendant Banks were merely custodians of the respective funds, pursuant to orders of the State courts; and now the defendant Bank of New York and Trust Company holds the fund of the Mos-
172 cow Company only "as agent or depositary" of that company; and in the case of the Northern Company the defendant President and Directors of the Manhattan Company is acting as assignee for the benefit of creditors under the New York statute. With respect to neither fund is there any relation of debtor and creditor insofar as the defendant Banks are concerned. The letter plainly refers only to such funds as were involved in State of Russia v. National City Bank, 69 Fed. (2d) 44, where an American bank was the debtor of the Russian Government for the latter's funds held on deposit; it has no application whatever to the present funds now in the hands of the defendant Banks merely as custodians. This is particularly emphasized by the inclusion in the letter of the claim of the Russian Volunteer Fleet, which was before the Supreme Court in Russian Volunteer Fleet v. U. S., 282 U. S. 481, for if it had been intended to transfer to the United States claims against dissolved Russian insurance companies for the recovery of New York assets, concerning which there had at the time been extensive litigation in the New York courts, it is at least reasonable to suppose that specific reference would have been made to them.

The suggestion of the Government that the Litvinoff assignment is not open to judicial construction requires little comment, for clearly where private rights are concerned, the mere assertion of the Government that suit should be commenced does not preclude the Courts from determining as a judicial matter the true meaning of the instrument involved. There is nothing in State of
173 Russia v. National City Bank, 69 Fed. (2) 44, holding to the contrary; and the statement on page 48 of the opinion

that "Our courts must accept the assertion of the government of the United States as to the effect of an assignment", when applied to the particular facts of that case, mean nothing more than that the authority of Mr. Litvinoff to make the assignment, and the right of the United States to accept it, will not be questioned by our courts. The word "effect" as used in this excerpt from the opinion, was not intended to preclude judicial interpretation of the language of the instrument itself.

I hold, therefore, that the two funds in the hands of the defendant Banks were not in any way affected by the Soviet decrees of confiscation, and that the United States has not acquired title to either fund; and with this disposition of the principal issues in the two cases, it seems unnecessary to consider the other points raised by counsel.

The motion of the defendant in each case to dismiss the complaint for insufficienty is granted; and the motions of the United States for injunctions pendente lite are denied.

Dated, November 28, 1934.

ALFRED C. COXE,
United States District Judge.

Filed, November 30, 1934.

174 In United States District Court, Southern New York

Present: Hon. Alfred C. Coxe, United States District Judge.

In Equity, No. 78–377

UNITED STATES OF AMERICA, COMPLAINANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT

Order and decree

December 19, 1934

The complainant, on August 22, 1934, having filed its bill of complaint herein, verified August 22, 1934; and complainant thereafter, by orders of this court, having filed and served certain bills of particulars of said complaint dated September 13, 1934, and October 1, 1934, respectively;

And complainant having moved by order to show cause dated August 22, 1934, upon the aforesaid bill of complaint and upon the affidavit of Edward J. Ennis verified August 22, 1934, and the papers thereto attached, for an injunction pendente lite restraining the defendant from distributing any part of the funds alleged in the

175 bill of complaint to be in the possession of the defendant; and complainant in further support of its motion for an in-

junction pendente lite having filed and served an affidavit of Valerian E. Greaves verified September 24, 1934, and the further affidavit of Edward J. Ennis verified October 4, 1934; and defendant in opposition to complainant's motion for an injunction pendente lite having filed with the court the following enumerated documents, namely: affidavit of John C. Vedder verified September 12, 1934, and Exhibits 1 to 5 inclusive thereto attached; the affidavit of Frederick B. Campbell verified September 11, 1934, and Exhibits A, B, and C thereto attached; the further affidavit of Frederick B. Campbell verified October 2, 1934, and the photostat of the proof of claim therein referred to; and letter from the Secretary of State of the United States dated September 24, 1934, and copy of letter therein referred to;

And the defendant by notice of motion dated August 29, 1934, having moved for an order dismissing the bill of complaint on the ground that said complaint fails to state facts sufficient to constitute a cause of action;

And the cause having come on to be heard;

NOW, upon reading the papers filed herein as above recited, and after hearing Martin Conboy, Esq., United States District Attorney for the Southern District of New York, on behalf of the complainant United States of America, in support of the bill of complaint and of the motion for an injunction pendente lite; and Frederick
176 B. Campbell, Esq., on behalf of defendant in support of motion to dismiss the bill of complaint and in opposition to complainant's motion for an injunction pendente lite; and due deliberation having been had; and the Court, on November 30, 1934, having rendered and filed its opinion, dated November 28, 1934;

And upon motion of Emmet, Marvin & Martin, Solicitors for the defendant; it is

Ordered, adjudged, and decreed that the defendant's motion to dismiss the bill of complaint for insufficiency be and hereby is granted, and the motion of the complainant for an injunction pendente lite be and hereby is denied; and that the bill of complaint be and hereby is dismissed.

And, complainant having applied for a suspension, pending appeal of the order and decree, and defendant having consented to such suspension upon the terms hereinafter specified; it is further

Ordered that the operation of this order and decree be and is hereby suspended until the coming down and the filing in this court of the mandate of the U. S. Circuit Court of Appeals upon an appeal by complainant to such court, upon the conditions hereinafter specified, namely:

(a) that the petition and allowance of appeal, the assignment of errors and the citation, be filed and served within two (2) days from the date hereof;

(b) that the printed transcript of the record shall be made, filed, and served by the complainant within ten (10) days from the date hereof;

177 (c) that complainant will apply to the U. S. Circuit Court of Appeals for the hearing of such appeal upon a date as near the commencement of the January 1935 Term (January 7, 1935) of said court as may be possible; and

(d) that complainant's brief on appeal will be served upon defendant's solicitors ten days prior to the date so set for argument of such appeal.

Filed, Dec. 20, 1934.

ALFRED C. COXE,
U. S. D. J.

In United States District Court, Southern District of New York

[Title omitted.]

Petition and allowance of appeal

The complainant, United States of America, by Martin Conboy, United States Attorney for the Southern District of New York, considering itself aggrieved by the order and decree in the
178 above-entitled cause, dated December 19, 1934, and filed December 20, 1934, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors filed herewith and prays that this appeal be allowed, that a citation be issued, directed to the above-named defendant commanding it to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may be just in the premises, and that a transcript of the record, proceedings and papers upon which the said decree and order were made, duly authenticated, be sent to thte United States Circuit Court of Appeals for the Second Circuit.

MARTIN CONBOY,
United States Attorney for the
Southern District of New York,
Solicitor for Complainant.

Office & P. O. Address, U. S. Courts & P. O. Bldg., Borough of Manhattan, New York City.

Ordered that the appeal prayed for by the complainant, United States of America, be and hereby is allowed.

Dated, New York, N. Y., December 22, 1934.

ALFRED C. COXE, *U. S. D. J.*

179 In United States District Court, Southern District of New York

[Title omitted.]

Assignment of errors

Now comes the complainant, United States of America, and files the following assignment of errors upon which it will rely on its appeal from the order and decree in the above-entitled cause dated December 19, 1934, and filed December 20, 1934:

1. The Court erred in granting the motion of the defendant to dismiss the bill of complaint for failure to state facts sufficient to constitute a cause of action.

2. The Court erred in granting the motion of the defendant to dismiss the bill of complaint for insufficiency.

3. The Court erred in denying the motion of the complainant for an injunction pendente lite.

4. The Court erred in holding that the assignment from the
180 Union of Soviet Socialist Republics to the complainant, dated November 16, 1933, did not transfer to the complainant all of the right, title, and interest of the Moscow Fire Insurance Company and all the right, title, and interest of all of its stockholders, in all of the property of the Moscow Fire Insurance Company in the United States, including the cash, securities, and other assets held by the defendant.

5. The Court erred in holding that the decrees of the Russian State nationalizing the Moscow Fire Insurance Company and appropriating all of its property in the United States, including the cash, securities, and other assets held by the defendant, are opposed to the public policy of the United States.

6. The Court erred in holding that the decrees of the Russian State nationalizing the Moscow Fire Insurance Company were ineffectual to reach the properties of the Moscow Fire Insurance Company in the United States.

7. The Court erred in holding that recognition of the Soviet Government by the United States did not change the confiscatory nature of the decrees of the Russian State nationalizing the Moscow Fire Insurance Company and appropriating all of its property in the United States, including the cash, securities, and other assets held by the defendant.

8. The Court erred in holding that the decrees of the Russian
181 State did not appropriate and transfer to the Russian State all of the right, title, and interest of the Moscow Fire Insurance Company and all of the right, title, and interest of all of its stockholders in all of the property of the Moscow Fire Insurance Company in the United States, including the cash, securities, and other assets held by the defendant.

9. The Court erred in holding that by the decrees of the Russian State the said Russian State did not become the liquidator of all of the assets of the Moscow Fire Insurance Company, including the cash, securities, and other assets held by the defendant.

Wherefore, complainant prays that the said order and decree, dated December 19, 1934, and filed on the 20th day of December 1934, be reversed and that the said Court may be directed to grant the complainant's motion for an injunction pendente lite as prayed for in the bill of complaint.

Dated, New York, N. Y., December 22, 1934.

MARTIN CONBOY,
United States Attorney for the
Southern District of New York,
Solicitor for Complainant.

Office & P. O. Address, U. S. Courts & P. O. Bldg., Borough of Manhattan, New York City.

182 [Citation in usual form omitted in printing.]

183 In United States District Court, Southern District of New York

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated January 15th, 1935.

MARTIN CONBOY,
U. S. Attorney,
Attorney for Complainant-Appellant.
EMMET, MARVIN & MARTIN,
Attorneys for Defendant-Appellee.

184 [Clerk's certificate to foregoing transcript omitted in printing.]

Penn General Casualty Co. v. *Penn ex rel. Schnader*, — U. S. — (Dec., Feb. 4, 1935). If the final decision is contrary to applicable Federal law, it may be reviewed by the Supreme Court. *Stanley* v. *Schwalby*, 162 U. S. 255, 278; *Spokane County* v. *United States*, 279 U. S. 80; *People's Trust Co.* v. *United States*, *supra;* 28 U. S. C. A. sec. 344 (b).

The motion for an injunction pendente lite had for its object a stay of proceedings in a State court which were within the jurisdiction of that court. No such injunction was authorized by any law relating to proceedings in bankruptcy; was not necessary to protect jurisdiction possessed by any Federal court; and was properly denied. 28 U. S. C. A. sec. 379. Decree affirmed.

Manton, C. J., dissents with opinion.

United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSOR to the Bank of Manhattan Trust Company, defendant-appellee

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1817, defendant-appellee

MANTON, Circuit Judge dissenting.

The complaints in these actions ask for accountings seeking to recover balances held by Russian insurance corporations, Moscow Fire Insurance Company of Moscow, Russia; the First Russian Insurance Company, and Northern Insurance Company of Moscow, Russia, held by the respective banks, appellees, as depositories. Each insurance company had its principal offices in Russia.

In *Bank of New York and Trust Company case*, the complaint alleges that in 1917 and 1920 decrees of the Russian State dissolved the Moscow Fire Insurance Company, that all of its right, title, and interest and all the right, title, and interest of the stockholders in its property, including deposits made with the Superintendent of Insurance of the State of New York, was confiscated and appropriated by the Russian State. It alleges that, on April 18, 1933, the claims of domestic creditors to the fund deposited with the Superintendent of Insurance of New York had been satisfied and that he,

pursuant to an order of the Supreme Court of New York, directed that the fund be released and paid, and the balance transferred and delivered to the agent or depository of the Moscow Insurance Company, not to be withdrawn except upon an order of a court of competent jurisdiction; that the appellee received and had cash securities amounting to $1,180,310.54. It set forth an assignment on November 16, 1933, by the Russian State to the appellant for valuable consideration, of all the right, title, and interest in and to the cash and securities constituting the balance of the deposit and also that the appellant by assignment had all the right, title, and interest of all Russian nationals in and to this cash and securities, and that it was the sole and exclusive owner entitled to immediate possession. It alleges a demand of and refusal by appellee to deliver this property to appellant and the wrongful withholding thereof.

In the *Van Schaick case*, the complaint pleaded that the First Russian Insurance Company had been dissolved by decree of the Russian State and its property, including its deposit with the Superintendent of Insurance of New York had been confiscated and appropriated by the Russian State. It alleges that on August 8, 1925, by order of the New York State Supreme Court, the Superintendent of Insurance took possession of the property of the domestic United States branch of that insurance company (established 1907) under section 63 of the insurance law of the State. That all domestic claims had been adjudicated and allowed, leaving undisposed of certain foreign claims which arose in the conduct of the business outside of the United States; that two claimants residing in the city of New York had been allowed $128,010.58 and $38,403.17 each respectively by an order of the State supreme court on February 26, 1934. That on appeal to the appellate division of the supreme court of the State, this award was affirmed (June 15, 1934), but that an appeal was taken to the Court of Appeals of the State of New York and is undisposed of. An assignment of the balance of $1,170,783.36, as of November 16, 1933, is pleaded.

In the case of president and directors of the Manhattan Company, it is pleaded that the Northern Insurance Company of Moscow is a Russian corporation with a branch in New York, and that it made a deposit with the Superintendent of Insurance of New York to comply with the requirements of the insurance law. That it too had been dissolved back in 1917 and 1918, and its property confiscated by the Russian State. That the superintendent of insurance took possession August 3, 1933; the claims of domestic creditors as to this fund, deposited with the superintendent of insurance, were satisfied pursuant to an order of the State Supreme court and directed that the funds be released, paid, and transferred to the agent or depository of the Northern Insurance Company of Moscow, said funds to be withdrawn upon order of a court of competent jurisdiction. The amount here involved was $332,994.15 held by the appellee. It is alleged that this too was assigned on November 16, 1933. Demands

were made for the payment of these moneys pursuant to this assignment and refused.

In each case a restraining order against disposition pending the trial of a suit was denied and on motion supported by affidavits, each of the complaints was dismissed.

The United States claims title to these balances and asks for an accounting by virtue of two assignments executed by agents of the Russian Government—the Ughet and Litvinov assignments, the first executed prior to and the second since recognition. The questions presented are: (1) Does the claim of the Government to the balance named in the hands of the appellees come within the terms of the so-called "Litvinov assignment"; and (2) assuming it does, what is the effect of a political recognition of the Union of Soviet Socialist Republics, and should such recognition be retroactive and extraterritorial in its effect?

As to the first question: On the 16th of November 1933, Litvinov, the People's Commisar for Foreign Affairs of the Soviet Union, executed in his official capacity, an assignment which was a part of the general scheme of recognition of the Soviet Union by the terms of which it assigned to the Government of the United States, "the amounts admitted to be due or that may be found to be due it (the Soviet Government), as the successor of prior governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, * * *."

Questions as to this assignment must be resolved according to the maxims and principles of the Law of Nations (*Henfield's Case*, 11 Fed. Cas. p. 1089, 1101), which require that a formal engagement between two nations—whether such engagement be in the form of a treaty or of an executive agreement—should be construed as liberally and untechnically as the exigencies of the case may demand in order to effectually carry out the evident or probable design of the parties in executing it. *Ware* v. *Hilton*, 3 Dall. 299; *The Amiable Isabella*, 6 Wheat. 71; *United States* v. *Arredondo*, 6 Pet. 691; *Geofroy* v. *Riggs*, 133 U. S. 267; *Wright* v. *Henkel*, 190 U. S. 40; *Rocca* v. *Thompson*, 223 U. S. 317.

"Such solemn international instruments between independent sovereignties as public treaties, intended primarily for the common advancement of their individual interests, the interests of civilization, and the promotion of international amity, are not to be read as rigidly as documents between private persons governed by a system of technical law, but, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence, should be construed in the light of that larger reason, that broader, fairer, and more liberal sense calculated to perpetuate that international concord which constitutes the spirit of the law of nations." (Puente, International Law, p. 228.)

The ultimate design of the two countries in executing this assignment was to transfer "the claims and counterclaims between the

Governments of the Union of Soviet Socialist Republics and the United States of America, and the claims of their nationals", to the broad plane of diplomacy, and by placing those claims beyond the reach of vexatious judicial action, to facilitate at one stroke, the adjustment of the delicate points at issue between the two countries. No narrow or strained construction of that instrument is permissible under these circumstances. The funds at issue are admitted to be the balances of the assets of Russian corporations with branch offices here affected by the Soviet decrees whose local business was liquidated by the courts of the State of New York. *Matter of Moscow Fire Ins. Co.*, 255 N. Y. 433. If it be sound, as the appellant contends, that the effect of the Soviet decrees is to vest in the Soviet Government complete title to those funds, and to give that Government a cause of action to recover them, then, on that hypothesis, we would be bound to hold that the funds in the safe keeping of appellee—an "American national"— are such as "may be found to be due" the Soviet Government within the terms of the assignment; that is, which "ought to be paid" by appellee, or which "may be demanded" by the assignor. 1 Bouvier, Law Dictionary, 3rd Ed. by Rawle, 946; *Ransom* v. *Bidwell*, 89 Conn. 137. The fact that by the terms of the assignment the Soviet Government has renounced its right to sue American nationals who may be indebted to it, is a circumstance strongly urging upon us the broadest possible interpretation of the terms of the assignment. If, however, the effect of the Soviet decree is not such as to vest title to the funds in the Soviet Government, then there would be no question that the funds would not fall within the terms of the assignment and the claims of the appellant must fail. Whether or not the funds here involved are included in the terms of the assignment depend upon the juristic effect of the political act of recognition, and on the degree of extra-territorial force which international comity—the *comitas gentium*—ordains that we should give to Soviet legislation of this character.

The conduct of the international relations of the nation is a matter of state (*The Regdai*, 278 Fed. 294) which the Constitution has properly placed in the hands of the executive and legislative—that is, the "political", departments of the national Government, and the propriety of whatever may be done in the exercise of this political power not subject to judicial review or inquiry. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Terrazas* v. *Donohue*, 227 S. W. 206 (Court of Civil Appeals, Tex.). No doctrine of public law is more firmly established than this: That it belongs exclusively to the department constitutionally in charge of the external affairs of the nation to recognize or decline to recognize a new government in an old state or a new state carved out of an old one (*Rome* v. *Himely*, 4 Cranch. 272; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Kennett* v. *Chambers*, 14 How. 38; *Selnicki* v. *Phila. Natl. Bank*, 273 Pa. 110) and to determine, in case of recognition, who is the *de jure* or *de facto* sovereign in such country. *Jones* v. *United States*, 137 U. S. 202; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Agency of Cana-*

dian Car & Foundry Co. v. *American Car Agency*, 258 Fed. 363 (C. C. A. 2). That determination, when made by the political department of the Government, concludes our courts on the legal status of such sovereign or government. *Ricaud* v. *Amer. Metal Co.*, 246 U. S. 304; *Jones* v. *U. S.*, 137 U. S. 202, 212; *Republic of Peru* v. *Peruvian Guano Co.*, 36 Ch. Div. (1887) 489.

Recognition is adequately defined as the act by which a State, which is already a member of the community of nations, signifies that it accepts another State as a juristic person of international law, with all the rights and obligations which the law establishes. *A. M. Luther* v. *James Sagor & Co.*, (1921) 3 K. B. Div. 549. While recognition is not necessary to enable a state to maintain its internal sovereignty (*McIlvaine* v. *Coxe's Lessee*, 4 Cranch. 209, 212; *Wulfsohn* v. *Russian S. F. S. Republics*, 234 N. Y. 372; *Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 226 227; Wheaton's International Law, Lawrence's Ed. p. 36), the authorities are nevertheless in accord that it is ordinarily indispensable to make the State's external sovereignty effective, or, to express it differently, to enable the State to become a juristic person of international law. *United States* v. *Hutchings*, 2 Wheeler Cr. Cas. 543, Fed. Cas. No. 15429; Holland, Lectures on International Law, Walker's Ed., 1933, p. 91; 1 Oppenheim, International Law, 4th ed. 1928, § 71 p. 143; 1 Louter, Le Droit International Public Positif [1920], p. 218; Visscher, Les Gouvernements etrangers en Justice, Revue de Droit International, Ser. III [1922], v. 3, p. 149; Ullmann, Trattato di Diritto Internazionale Pubblico, tr. by Buzzati, 1914, § 30, p. 184. Recognition clothes a *de facto* state with an international status (*Salimoff & Co.* v. *Standard Oil Co.*, 282 N. Y. 220, 227) and confirms the self-existence of such State (Zeffter, Le Droit International de l'Europe, Bergson's trans. [1883] p. 61). It implies a formal engagement to respect the rights and powers of sovereignty in the new State and to accept its form of government as adequate to express its rational and normal will.

"In recognizing the State, we consequently recognize its legislative capacity; we accept its legislation, both statutory and consuetudinary, as defining the laws of its national existence sufficiently for international purposes." (1 Lorimer, The Institutes of the Law of Nations [1883] 325.)

Recognition, moreover, clothes the State recognized with international capacity to enter into diplomatic relations and to conclude treaties (1 Oppenheim, op. cit., § 75*d*, p. 15), and accepts the validity and efficacy of the acts of the recognized State—be those acts executive, legislative, or judicial—and it impresses upon them a retroactive effect from the commencement of the existence of such State or Government. Thus, the Supreme Court has said in *Oetjen* v. *Central Leather Co.* (246 U. S. 297, 303), that "recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its ex-

istence." In *Underhill* v. *Hernandez* (168 U. S. 250, 253), the Court said:

"If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation."

The same principle has been accepted by tribunals of respectable authority in other countries. In England, the House of Lords in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1933] A. C. 289, decided that—

"The effect of such recognition is retroactive and dated back to the original establishment of Soviet rule which was in the 1917 October revolution, as was held by the Court of Appeal in *Aksionairnoye Obschestve A. M. Luther* v. *James Sagor & Co.*"

In France, the Civil Tribunal of the Department of the Seine in De Mayenne e, Jeutel, 55 Clunet, 710 [1926] held that "the effect of the *de jure* recognition of the Union of the Soviet Socialist Republics, except as it attempts to take away vested rights, is retroactive and goes back to the day of the commencement of the juridical existence of the new government."

Protected by the retroactive effect of recognition are also legislative (*Murray* v. *Vanderbilt*, 39 Barb. 140, 146) and executive (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Monte Blance Real Estate Corp.* v. *Wolvin Line*, 145 La. 563, 85 So. 242) acts of confiscation.

We must take judicial notice of the recognition of the Soviet Government by our Government on November 16, 1933 (*Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *Amer. Metal Co.*, 246 U. S. 304; *City of Berne* v. *Bank of England*, 9 Ves. 347, 32 Repr. 636; *Mighell* v. *Sultan of Jehore* [1894] 1 Q. B. Div. 149, 158, 161, A. C.; *Duff. Development Co.* v. *Govt. of Kelantan*, [1924] A. C. 797, H. of Lords), and applying the foregoing principles to the state of facts before us, we are bound by the determination of our political department regarding the international legal status of the Soviet Government; that recognition having been accorded, we must accept the Soviet Government as a legitimate governmental authority in Russia, and its institutions and laws as adequate expressions of the national will to meet the requirements of international law; that the effect of the recognition of that Government is to retroact upon and validate for international purposes, all the acts, whether legislative, executive, or judicial, of that Government, including the decrees by which the property and assets of the respective insurance companies were affected from October 1917, when that Government came into power.

But, as each nation can legislate only for itself (*The Antelope*, 10 Wheat. 66, 122), to hold, as we must, that the recognition of the Soviet Government is retroactive and that its actions are validated, in our judgment, does not answer the question on which these cases necessarily revolve, namely, whether the legislation of the Soviet

Government, as it affects these insurance companies, should be recognized and applied by our courts so as to vest in the Soviet Government title to the assets of the corporations located here and thus enable that Government to assign such title to the United States as it purports to do. That question is not free from intrinsic difficulties, and the studied views of those who have considered and written on the subject, and the *obiter dicta* of the courts as they have had occasion to comment on it, are far from being in agreement. Realizing that for the first time, perhaps, in the judicial history of this country the courts have been called upon by a foreign power, with whom we are now in relations of amity, to give extraterritorial effect with respect to property located here, to its admittedly confiscatory legislation, requires that we approach the subject with caution. That the legislation of each State is local in character and has no force *proprio vigore*, beyond its jurisdiction, is a principle flowing from and in entire harmony with the dominant conceptions of political science in every land. In the case of *The Apollon* (8 Wheat. 362, 370) [1824], Mr. Justice Story said:

"The laws of no nation can justly extend beyond its own territory, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons upon whom the legislature have authority and jurisdiction."

This general principle has been followed down to the present time without any material variation. *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 536; *Huntington* v. *Attrill*, 146 U. S. 659, 689; *Hilton* v. *Guyot*, 159 U. S. 113, 163; *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404 (C. C. A. 2). It is also accepted in the English courts (*Sedgwick Collins & Co.* v. *Russian Ins. Co.* [1925] 1 K. B. Div. 1, 15). The principle is given even a more rigorous application with respect to foreign laws or judgments which are contrary to morals, to public policy or prejudicial to local interest (*Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Vladikavkazsky Ry Co. v. N. Y. Trust Co.*, 263 N. Y. 369, 378), or are of a penal character (*Baglin* v. *Cusenier*, 221 U. S. 580; *Huntington* v. *Attrill*, 146 U. S. 657, 667; Wharton, A Treatise on the Conflict of Laws, 2d Ed. [1881] § 4).

But, within the sphere of sovereignty enacting it, that legislation is effective to regulate fully the status of all persons and things therein, and to determine the juristic effect of every act or relationship done or established under it. To the full force of this principle, the respective insurance companies had to yield their unqualified assent. They came into being under the laws of an imperial sovereign; they lived many years under the imperium of those laws; and in 1918 a new sovereign power, the legitimacy of which has been explicitly accepted by our Government, cut short their lives; it took over their corpus—their properties and assets. Such was the fate of these cor-

porations in territories subject to Russian jurisdiction. As to the fate of the branches of these corporations here, the problem is not simple, for there the acts of the Russian Government may clash with local conceptions of private international law or policy.

That the continuity and conditions of juristic personality depend on the pleasure of the legislator who creates it, may safely be admitted. 9 Holdsworth, A History of English Law [1926], p. 48.

In *Canada Southern R. Co.* v. *Gebhard* (109 U. S. 527, 537), the Supreme Court said:

"Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to make it a corporation of the latter country, be taken, both by the Government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

And there is no reason why the suppression of a juristic person by the legislative act of a sovereign which created it, should be regarded by the courts of other countries as contrary to their public policy. The fortune that betakes a corporation under the law which created and controlled it, betakes in like measure the branch offices both at home and abroad. The reason for this is that a branch office is nothing more, in the eyes of the law, than a prolongation of the life of the foreign corporation, without independent juristic existence of its own. This is the posture taken on repeated occasions with regard to the branch offices of these extinct Russian corporations, by the courts of Poland (Affaire de Julien Muszkat c. Soc. d'Assur. Rossia [1929], Supt. Ct., 58 Clunet, 770, 771); France (Banque generale pour de Commerce etranger c. Jaudon [1924] Trib. civ. Seine, 52 Clunet, 419, 420; Cie. Nord de Moscou e. Phenix Espagnol [1928] Cour d'Appel, Paris, 56 Clunet, 119, 130; Soc. Vairon et Cie. c. Banque de Commerce de Siberie [1928] Sirey, Rec. Gen., Jour. du Pal., 161, Cour d'Appel, Bordeaux); and Switzerland (Banque internazionale de Commerce de Petrograd S. A. [Succursale de Geneve] c. Hausner [1924] Trib. Federal, 52 Clunet 488). It is also the position taken by the British courts in *Banque Internationale de Commerce de Petrograd* v. *Goukassow*, [1923], 2 K. B. 682, C. A., Scrutton, L. J. And in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1933] A. C. 289, Lord Wright said:

"English Courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. * * * But as the creation depends on the act of the sovereign state which created them, the

annulment of the act of creation by the same power will involve the dissolution and nonexistence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact."

The same rule was recognized in *Russian Reinsurance Co.* v. *Stoddard, Jr., Supt. of Ins.*, 240 N. Y. 149, 154. But the Court of Appeals of New York, in recent cases, seems to have adopted what may be called the organic theory of juristic personality in opposition to the fictional theory which to this day has held a predominant position in the field of legal philosophy and judicial history and is the theory of our own law. Thus in *Petrogradsky M. K. Bank* v. *National City Bank* (253 N. Y. 23, 28 [1930]), the court said:

"We think the plaintiff is not dissolved, but is still a juristic person with capacity to sue."

In *Severnoe Securities Corp.* v. *London & Lancashire Ins. Co. Ltd.* (255 N. Y. 120, 122 [1931]), a Russian corporation, whose juristic personality was in dispute, was declared to retain "a pallid life as the shade or little more of its former self." *In Matter of People* (*Russian Reinsurance Co.*) (255 N. Y. 415, 425 [1931]), the Russian corporations were declared to be "still juristic persons." In *Salimoff & Co.* v. *Standard Oil Co.* (262 N. Y. 220, 225 [1933]) in speaking of Russian banking and insurance corporations, the court observed that—

"* * * corporations nonexistent in Soviet Russia have been, like fugitive ghosts endowed with extraterritorial immortality, recognized as existing outside its boundaries. The juristic person, the Russian corporation, dead in the country which created it, has received juridical vivification elsewhere."

This reasoning in the cases referred to coming before the Court of Appeals prior to the recognition of the Soviet Government, might have some theoretical justification, on the ground, possibly, of the technical continuity of the ancient Russian regime (*Rome* v. *Himely*, 4 Cranch, 272; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Re Ambrose Light*, 25 Fed. 412) and the presumed illegality of the new (*Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 224), a view, however, which has not passed unchallenged by high authority (Banque Internationale de Commerce de Petrograd S. A. [succursale de Geneve] c. Hausner [1924], Trib. Federal, Switzerland, 52 Clunet, 488). But that the logic of these cases should be extended, as is pretended (*Vladekavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378), to acts whose legality we have tacitly approved when we recognized the government under whose authority they were done, is clearly a breach of the comity which one nation owes another. So singularly frail is the foundation of such reasoning when applied after an act, e. g., recognition, which necessarily must alter the judicial application of legal theories, that the New York Court of Appeals stands

alone on this proposition. In thus holding, it goes against the current of authority, and controlling principles of public international law which nations in relation to mutual friendliness must observe toward each other. Considering the matter as a question of fact, i. e., failure of proof of extinction—and not of legal theory, as the New York courts have done, the House of Lords of England held in 1925 that banking corporations were not dissolved by Russian nationalization decrees of December 14, 1917 (*Russian Commercial & Industrial Bank* v. *Comptior d'Escopte de Mulhouse*, [1925] A. C. 112, 134, L. H.; *Banque Internationale de Commerce de Petrograd* v. *Goukassow*, [1925] A. C. 150, H. L.).

Passing from the imponderables of juristic theory—corporate personality—to its ponderables—corporate assets—we invoke, in a truer and broader sense, the application of principles of public and private international law which must be made to coexist and to cooperate toward the adoption of a policy of substantial justice.

A practical result of the political soveignty of each country is the right of each to change its political institutions at discretion, and to legislate concerning its own interests according to its convenience and needs. Sec. Webster, Jan. 12, 1852; *King of Prussia* v. *Kueper's Admr.*, 22 Mo. 550 [1856]; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 83.

Thus, in the exercise of the right accorded to every State by the most widely accepted of all the principles of the law of nations, the Soviet Government nationalized the business of insurance in which these companies were engaged, and confiscated their property. No doubt exists that the operation of the laws of a foreign state often transcend, and necessarily so, their territorial orbit of action. What gives them force in other jurisdictions is the comity between nations which calls on the representatives of each sovereign state to observe a mutual respect in considering the effects of such of their official acts as project themselves into a foreign jurisdiction. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404, 409 (C. C. A. 2); *Hilton* v. *Guyot*, 159 U. S. 163; *Sedgwick Collins & Co.* v. *Rossia Ins. Co.*, [1926] 1 K. B. 1, 17, C. A. And, as a general rule, the acts of the recognized government when invoked by litigants in the forum of a friendly nation, will not be permitted to be impeached. "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U. S. 250, 252. The reason, of course, is that to permit the validity of those acts to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 304.

Two possible grounds exist for refusing to give the Soviet decree extraterritorial application. One is public policy; the other is its penal character—assuming it is penal. The conception embodying the idea of public policy is wrapped in considerable vagueness as is generally admitted. *Hadden* v. *Barney*, 5 Will. 107; *Egerton* v. *Brownlow*, 4 H. L. Cas. 1, 123. The view expressed concerning public policy by these, the highest tribunals of England and the United States, warn against the danger of taking uncertain and unsatisfactory concepts as the deciding yardstick according to which the legislation of the recognized Government of Russia is to be accepted or rejected in our courts. Considerations of an international character urge us to accept with great reluctance, a local conception of public policy as the determining factor in the relations between friendly nations. Is the confiscatory legislation of a recognized government, which produces effects only within its own jurisdiction, and respecting its own nationals or foreigners, per se, against public policy? Certainly not. Speaking of the confiscatory legislation of the State of Georgia in 1782, which expropriated the property of British loyalists, and particularly that of Wright, the provincial governor, during our Revolutionary period, the Lord Chancellor of England, as far back as 1788, said in *Wright* v. *Nutt* (1. H. Blackstone, 136, 149, 126 Repr. 83, 89):

"It may be a question for private speculation, whether such a law made in Georgia was a wise or an improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an independent country, and the laws of every country must be equally regarded in courts of justice here, whether in private speculation they are wise or foolish."

This original principle has been accepted without question in subsequent adjudications involving our own nationals and nationals of the country putting such legislation into effect. *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Murray* v. *Vanderbilt*, 39 Barb. 140, 146.

Is such legislation against public policy if it seeks extraterritorial application? Gratuitous expressions in the courts of New York, England, and France, give the impression that they would hold—if the occasion arose—that any infringement of the right of private property, which operates upon property situated in those jurisdictions, would be against their public policy.

But in close analysis, it will be found that many of these expressions were unnecessary to the decision of the actual question before the courts and they do not apply to the specific problem before us. The cases there referred to concern the protection of rights acquired locally, such as the payment of debts, the enforcement of contracts, and the right of succession under the local law, all of which come properly under the operation of well established principles of private

international law. On the other hand, there is much authority in the decisions to the effect that there is nothing in the confiscatory legislation of a recognized government which can be against the public policy of the recognizant State, even when the legislation of the former is judged exclusively according to the local conceptions of the latter rather than by general standards. While there is a divergence of opinion on the question whether the Soviet decrees of nationalization are contrary to public policy, it is well to bear in mind the admonition of the Supreme Court in *Hedden* v. *Berney*, *supra*, against the practice of permitting judicial tribunals to decide according to their unchecked discretion what should be the public policy of a nation, particularly on a question of international concern. The known practice of the executive department of the nation pronouncing the public policy of the nation should be controlling upon the courts in such instances.

The public policy of the country may be declared in the Constitution and, if that instrument is silent, the three departments of the Government have the power within their respective spheres, to declare what the public policy is; the executive, by proclamation or some other authoritative act; the legislative, by statute; the judiciary by judicial decisions. The chief executive, acting as the constitutional organ of international relations, may declare, in the course of the administration of the affairs of the Nation, its public policy with respect to any question within his legitimate competency. The act of recognition of a foreign government may import the equivalent of a definite declaration of policy which the courts would be bound to notice. Should we for any reason disapprove of the policies of a foreign government which seeks our recognition, we would be within our rights in declining to recognize it on that ground solely. In *A. M. Luther* v. *James Sager & Co.*, [1921] (3 K. B. 532); it appears that the Soviet Government had been extended *de facto* recognition by the British Government. It was contended that the confiscatory decrees of that Government were in their nature "so immoral, and so contrary to the principles of justice" as recognized in England, that the courts should disregard them, Lord Scrutton saying:

"Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the courts could investigate the title without infringing the comity of nations. But it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will."

While we have said that recognition is retroactive and that its effect is to preclude the tribunals of the recognizant state from questioning the validity or legality of the actions of the government recognized, and that it invalidates, so far as concerns the tribunals of the recognizant state, transfers of property and other transactions which before recognition would have been treated as invalid by

those tribunals (1 Oppenheim, International Law, 4th Ed. [1928] § 75*d*, p. 155; Hervey, The Legal Effects of Recognition in International Law, [1928] 82, 87), an important qualification of this general principle must be formulated, and that is, that as in the interregnum between the establishment of a foreign government in power and its recognition by this Government, it cannot be said to be entitled to any comity and its legislation to any respect (*Rose* v. *Himely*, 4 Cranch, 272; *Gelston* v. *Hoyt*, 3 Wheat. 246) at our hands during such period whatever has been done in the courts, with legal finality, must be regarded as *res judicata* and valid as against the world. So that in establishing a new policy or changing an old one, the act of recognition must be understood to have effect only from the date it actually takes place as to questions which are *res judicata* and irrevocable, but as to questions which are still pending or not affected with litigation, or which are political in nature, the effect must be understood as from the commencement of such government. Therefore, during the interregnum, the corporations were correctly regarded here (because of the refusal of our courts on grounds of public policy to give effect to the Soviet legislation), as a juristic person, and as such subject to the application of the principles of private international law, the most frequently invoked in these Russian cases having been the *lex rei situs* and the *lex loci contractus*. *Salinoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220; *Sedgwick Collins & Co.* v. *Rossia Ins. Co.*, [1926] 1 K. B. 1; *In re Russian Bank for Foreign Trade*, [1933] Chancery 745; *Egger* v. *La Baloise-Vie*, [1924] Triv. civ. Seine, 52 Clunet, 1006.

In any litigation between private individuals putting in opposition the laws of respective countries the conflict must be resolved according to the rules of private international law. The principle which during such interregnum applied to the branch offices of these corporations in this country, was clearly formulated in the Treaty on International Commercial Law of Montevideo [1889] (art. 6) as follows:

"The branches or agencies established in a state by a corporation domiciled in another, shall be considered as domiciled in the place where they do business and subject to the jurisdiction of the local authorities regarding the business which they may do."

Under this qualification of the general principle of the retroactivity of the act of recognition, the rights which the Soviet Government acquired here with respect to these companies and their assets under the decree of nationalization must date only from the date of actual recognition—that is November 16, 1933; but as to what occurred before, the rights of the Soviet Government must be understood as subordinate to and regulated by the principles of private international law to the extent which those principles govern the rights of our nationals or inhabitants acquired under our laws in the course of business with the companies prior to actual recognition. Anything adjudicated by our courts subsequent to the date of actual recognition must, therefore, be treated as void.

When, therefore, the Soviet Government was recognized, the courts lost all right to continue to inject their prerecognition conceptions of public policy into the international panorama in manifest derogation of the express determination of the political department and the clear juridical implications of the act of recognition. As said by Lord Scrutton, L. J., in *A. M. Luther* v. *James Sagor & Co. supra:*

"But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized. The English courts act on the rule 'that an intention to take away the property of a subject without giving him a legal right to compensation for that intention is expressed in unequivocal terms': *Central Control Board* v. *Cannon Brewery Co.* If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or nonrecognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges."

The Russian decrees extinguished the lives of these companies and appropriated their property and general assets. If those decrees were effective to extinguish their lives abroad as well as at home, why should it not be effective also to take over their property and assets abroad where the companies had branches, to as full an extent as at home, if our political department has made a public declaration of policy with respect to such legislation which validates it, and the rights of those who have claims against the corporations are safeguarded by our courts under the qualification of the principle of retroaction indicated and the established principles of private international law? When, then, our Government recognized that of Russia, it also recognized its legislation. By that legislation, the Government of the Soviets ended the lives of these corporations and took over their assets. That legislation this court is bound to recognize and apply since November 16, 1933, as to matters *res judicata*, in as full a measure as our political department has recognized it, and we are foreclosed from further questioning it by the very act of

recognition. Recognition changes a policy of official disfavor into an attitude of graceful acquiescence. To impeach this legislation now in the courts as being against our public policy would clearly trench upon the sphere of the executive who has already decided the matter in a manner that concludes our courts.

As to the question whether the Russian decree is of a penal character, I do not hesitate to say that I cannot so regard it. A statute is penal if it inflicts a penalty for the violation of some of its provisions (*Huntington* v. *Attrill* (1893) A. C. 150, 156, H. of L.; 3 Bouvier's Law Dictionary, 3rd ed., by Rawle, 1914, p. 2551), or, if it fixes upon a wrongdoer any extraordinary liability in favor of the person wronged, not limited to the damages suffered (*Huntington* v. *Attrill*, 146 U. S. 657, 667). It is evident that the reported cases do not indicate that they are vitiated with the criminal or tortious elements which these definitions involve. In *Baglin* v. *Cusenier*, 221 U. S. 580, and *Lecouturier* v. *Roy* (1910) A. C. 262, which have been cited by counsel as authority against the retroactivity of the supposedly confiscatory legislation of the French Government, must be considered in the light of the French law—the Loi relative au contrat d'association, of July 1, 1901, 63 Bull. des Lois, 12 c. ser., II Sem. (1901), pt. princ., p. 1273)—art. 19 of which provides:

"The provisions of art. 463 of the penal code shall apply to offenses contemplated by the present law."

That law clearly fell within the terms of the first portion of our definition.

The right of the United States to sue in the national court has been questioned on the ground that the balances claimed by appellant are now, as it is alleged in process of adjudication in the state courts, and the majority opinion turns upon this question. To uphold the jurisdiction of the state courts, and avoid giving extraterritorial effect to the Soviet decrees, the majority opinion has taken the unwarranted position that the effect of the dissolution of the insurance company upon its assets was to debase the sovereignty of the state to the status of the corporation. The majority opinion reads:

"Consequently we must for present purposes take the Soviet Government to have become to all intents and purposes the Russian insurance corporation in Russia which owned the deposit in New York subject to the fulfillment of the conditions upon which the deposit was made with the New York Superintendent of Insurance."

This position, of course, reverses law, logic, and fact. It reverses law because the dissolution of the corporation and the nationalization of its property did not lower the Soviet Government to the plane of the private litigant without its express consent; it reverses logic, because such dissolution did not assimilate the Russian Government with a corporation which was legally nonexistent; and it reverses fact because such nationalization could not involve a debasement of sovereignty. On the contrary, the dissolution and nationalization had the effect of absorbing the assets of the corporation into

the rest of the public assets and placing them beyond the reach of the processes of the tribunals of foreign states. Art. 3, §2 of the Constitution, says: "the judicial Power shall extend * * * to Controversies to which the United States shall be a Party."

Section 41 of the Judicial Code gives the District Courts original jurisdiction of "all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue".

The Government is clothed with full juristic capacity to come into its own courts, either as a party plaintiff or an intervenor, to protect or claim its lawful rights. Of this there can possibly be no doubt. But it is said that since the State courts first acquired jurisdiction and control over the *res*, the United States courts lack authority, under the doctrine of jurisdictional priority repeatedly announced by the Supreme Court (*Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 88; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *Wabash R.* v. *Adelbert College*, 208 U. S. 38; *Farmers Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 61; *Byers* v. *McAuley*, 149 U. S. 608, 614; *Merritt et al.* v. *Amer. Steel-Barge Co.*, 79 Fed. 228 [C. C. A. 8]), to entertain these suits and to proceed therein as prayed. To this general principle which, as has been said, is a principle "of right and law, and therefore, of necessity" (*Covell* v. *Heyman*, 111 U. S. 176, 182), and "essential to the dignity and just authority of every court" (*Buck* v. *Colbath*, 3 Wall 334), I, of course, subscribe. But I perceive no conflict between this salutary rule and the suits brought by the United States in its own courts; if the principles of the retroactivity of recognition and the extraterritoriality of the legislation of a foreign government within the limits already indicated, are regarded in the proper light, and in that light applied to the questions before us.

Upon matters which were *res adjudicata* on November 16, 1933—the date of recognition of the Soviet Government—under principles of private international law underlying questions of this character, such recognition can have no disturbing effect; upon matters which were pending or not decided with the authority of finality on the date of recognition and which involved the properties or assets of nationalized Russian companies not affected with the application of principles of private international law, it is clear that whatever was done in the state courts was done at the risk of a declaration of nullity, for the courts should have known that they were dealing with the properties or assets of a foreign government whose confiscatory legislation we have approved by the very fact of recognition and by taking an assignment comprising in many instances the fruits of such legislation. Therefore, on the date of recognition the state courts lost jurisdiction and control of the properties and assets in question. The United States was at liberty to proceed in its own courts, without ousting the state courts of jurisdiction, or, of delaying or obstructing the state courts in the exercise of their jurisdiction, or of leading to a conflict of authority between the Federal and the State

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT-APPELLEE

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges

In equity. Appeal from a decree of the District Court for the Southern District of New York dismissing the bill of complaint and denying plaintiff's motion for an injunction pendente lite. Affirmed.

Martin Conboy, United States attorney; Francis H. Horan and Edward J. Ennis, assistant United States attorneys.

Emmet, Marvin & Martin, solicitors for defendant-appellee, Bank of New York & Trust Co.; Frederick B. Campbell, Paul C. Whipp, Lounsbury D. Bates, of counsel.

Cabell, Ignatius, Lown & Blinken, solicitors for intervenor; Hartwell Cabell, of counsel.

Samson Selig, amicus curiae; Samson Selig and George D. Bradford, of counsel.

Engelhard, Pollak, Pitcher, Stern & Clarke, attorneys for judgment-creditors of Moscow Fire Ins. Co.; Walter H. Pollak, Murray I. Gurfein, of counsel.

CHASE, Circuit Judge.

This is an action in equity for an accounting. The suit was commenced August 22, 1934. It is alleged in the bill that the Moscow Fire Insurance Company of Moscow, Russia, was a corporation organized under the laws of the State of Russia to engage in the busines of fire insurance and that, until dissolved, it was duly authorized in accordance with the laws of the State of New York to do business in that State; that in compliance with the New York law it had deposited with the New York Superintendent of Insurance certain cash, securities, and "other items of value" as a fund out of which the claims of the domestic creditors of the corporation should be paid and that it had done business in New York; that in 1917 and 1918 it was dissolved by decrees of the Russian State "and all of its right, title, and interest and all the right, title, and interest of all of its stockholders in its property, including the deposits hereinbefore mentioned with the Superintendent of Insurance of the State of New York, were confiscated and appropriated by the said Russian State"; that by April 18, 1933, all the claims of domestic creditors to the fund so deposited had been satis-

fied and the New York Superintendent of Insurance had, pursuant to an order of the Supreme Court of New York, New York County, deposited with the defendant, as the agent or depository of the said Moscow Fire Insurance Company, the remainder of said fund consisting of cash and securities of the value of $1,080,399.54 upon the condition that it was not to be withdrawn except upon the order of a court of competent jurisdiction; that the defendant had possession of the fund so deposited or of the avails thereof. It was further alleged that on or about November 16, 1933, the Russian State assigned all of its right, title, and interest in the deposit to the plaintiff, who is the sole owner entitled to immediate possession, and who had demanded the fund of the defendant; that the demand had been refused and that the fund was being wrongfully withheld from the plaintiff by the defendant. It was further alleged that the defendant held the fund as trustee for the plaintiff who had no adequate remedy at law. An injunction to keep the fund in the possession of the defendant pendente lite was a part of the relief sought.

The defendant did not answer but moved to dismiss on the ground that the bill stated no cause of action. The plaintiff's motion for an injunction was denied and the defendant's motion to dismiss granted.

Although the appellee has argued at length that the assignment did not convey to the plaintiff any title to or interest in the fund for the reason that (1) the assignor had no title or interest not based upon confiscation, which is a concept so repugnant to our public policy that we will not recognize and enforce it; and (2) that the assignment in terms did not cover the fund, we think the order must be affirmed regardless of whether there is any merit in the argument on these two points. For present purposes we will assume the assignment to be sufficient to transfer to the plaintiff whatever right to an accounting by the defendant the Russian State, the assignor, had. See *State of Russia* v. *Nat. City Bank*, 69 Fed. (2d) 44.

We take judicial notice of the recognition of the Soviet Government by the United States on November 16, 1933, which was the day on which the assignment here relied upon was made. *Underhill* v. *Hernandez*, 168 U. S. 250. By that act of recognition the decrees under which this Russian corporation was dissolved and its property confiscated by the Soviet Government became as valid as they would have been had they been passed at a time when we had already recognized the Soviet Government. The effect of recognition was to that extent retroactive. *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297. When our Government recognized that Government the public policy of this country to recognize the validity of Soviet decrees within Soviet territory was established. No one will question the power of the Government of the domicile of a corporation to destroy what it has created. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 587; *Head* v. *Providence Ins. Co.*, 2 Cranch 127, 168. When the now recognized Soviet Government issued its decrees to that effect this corporation was

dead. *Oklahoma Gas Co.* v. *Oklahoma*, 273 U. S. 257; *The Greyhound*, 68 Fed. (2d) 832 (C. C. A. 2). There can be no serious dispute that its property and all its corporate rights in Russia were subject to such disposition as actually took place in accordance with Russian law. The Russian State obviously could, and this record shows that it did, confiscate everything belonging to this corporation within the confines of Russia. It could, and did, acquire for itself every right the corporation in Russia possessed. It became the corporation there so far as we are now concerned. It had all its property and rights as fully as though the corporation had lawfully assigned them to it before dissolution. To that extent our public policy as to confiscatory decrees, so far as it may be expressed by our courts, is of no moment. When the executive branch recognized the Soviet Government, the judicial branch became bound to recognize the validity of Soviet decrees in Soviet territory from the beginning of the Soviet regime. *Oetjen* v. *Central Leather Co.*, *supra*. See also, *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (1933), A. C. 289, H. of L., for the rule in England. Consequently we must for present purposes take the Soviet Government to have become to all intents and purposes the Russian insurance corporation in Russia which owned the deposit in New York subject to the fulfillment of the conditions upon which the deposit was made with the New York Superintendent of Insurance.

For present purposes, also, we may assume arguendo that the present plaintiff has by assignment acquired all the rights in and to the deposit which the Soviet Government took in Russia from the corporation which made the deposit. That is the best position the plaintiff can claim and in view of the disposition which in our opinion now must be made of this appeal we think it would be inadvisable, as it is unnecessary, to express our opinion on the merits as to this point. It is enough that we assume without deciding that the plaintiff has all the rights which the depositing corporation would, if now in existence, possess. The transfer of those rights to the plaintiff did not enlarge them because the assignee happened to be the United States. The United States has no greater rights than those of an assignor. *United States* v. *Buford*, 3 Pet. 12, 30; *Ritter* v. *United States*, 28 Fed. (2) 265. Though sovereign powers have been dealing with each other they have been dealing in private causes of action and the plaintiff is simply attempting to enforce, as assignor, the claim of a Russian corporation to what remains of a deposit it made in this country.

As has already been stated this remainder of the original fund has been placed on deposit with the defendant bank pursuant to an order of the New York court. It is now pertinent to state further that the record shows that this order of the New York court was made in the course of liquidation proceedings brought and prosecuted by the New York Superintendent of Insurance in accordance with the New York law in New York courts within whose jurisdiction the fund actually was. On August 11, 1931, the New York Supreme

Court acting in accordance with a decision of the New York Court of Appeals (see *In re People-Moscow-Fire Insurance Co. of Moscow, Russia*, 255 N. Y. 433) ordered the deposit now in controversy made in the defendant bank. Rather extensive liquidation proceedings have been conducted in the New York courts which it will now serve no good purpose to relate in detail. The important matter is that before this action was commenced the fund in controversy had been taken into the custody of the New York court and has ever since remained in its custody. The sole purpose of the proceeding in the New York court was to liquidate the fund and distribute it according to its laws. To that end, the State suit was in rem. During its prosecution the remainder of the fund consisting of cash and securities left after domestic creditors had been paid was actually deposited with this defendant under an order of the court which controlled within its own proper jurisdiction the proceedings and the fund in liquidation. That being so this suit cannot be maintained to deprive the State court of its previously acquired jurisdiction of the res in its custody. *Covell* v. *Heyman*, 111 U. S. 176; *Harkin* v. *Brundage*, 276 U. S. 36; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77; *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38; *Farmers' Loan & Trust Co.* v. *Lake St. Elevated R. Co.*, 177 U. S. 51. Though the Federal courts have original jurisdiction of suits at law or in equity in which the United States is the plaintiff such jurisdiction is not exclusive. *People's Trust Co.* v. *United States*, 23 Fed. (2) 381; *Merryweather* v. *United States*, 12 Fed. (2) 407. Were the proceedings in the New York court one for a personal judgment only the result would be otherwise for the rule is that a prior action in personam does not prevent the maintenance of an action for the same cause in another jurisdiction. At least until the matters in issue become res adjudicata. *Kline* v. *Burke Const. Co.*, 260 U. S. 226. Even then the effect is of a different nature, being what is attributable generally to such a plea and its proof. Nor is there any question here of the personal liability of the defendant apart from what may attach solely from the fact that a fund in the custody of the State court to which the plaintiff makes claim has been placed in its possession under the order of the State court. There being no such separate personal liability there is no room for the application of the rule expressed in *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, that rights in personam within the Federal equity jurisdiction will be determined and enforced when by so doing property in the custody of the State court is not seized and controlled. Compare, *Byers* v. *McAuley*, 149 U. S. 608.

The real status of the plaintiff as only a claimant to the fund is at least emphasized by the fact appearing of record that it did on August 13, 1934, file proof of its claim in the State court action for the entire $1,080,399.54 and interest. Its claim was based upon the facts relied upon in this suit brought but nine days later. Apparently the claim was not pressed. Under the circumstances already related the jurisdiction of the New York court should be respected.

courts (*Merritt* v. *American Steel-Barge Co.*, 79 Fed. 228 [C. C. A. 8]). In other words, and as a limitation to the principle of jurisdictional exclusion on the grounds of priority, the "possession of the officer of court" was discharged (*Buck v. Colbath*, *supra*) by the act of recognition, as to those matters or claims not affected with the application of principles of private international law. It was, therefore, within the competency of the district courts to entertain the suits filed and to issue the injunctive relief prayed by the United States, since § 265 of the Judicial Code, which forbids the Federal courts "to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy", must be construed in connection with § 262 which authorizes the Federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 228. It may not be maintained that, if after November 16, 1933, the State courts lost jurisdiction over the assets of the recognized Russian Government, any injunction issuing from a court of the United States would act to stay proceedings in any court of the state within the meaning of the statute. No proceedings can be stayed, no ousting of jurisdiction or custody can occur, no delay or obstruction in the exercise of jurisdiction can take place, no conflict of authority can happen, where lawful jurisdiction is wanting by operation of law.

The decrees should be reversed.

United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the City of New York, on the 27th day of May, one thousand nine hundred and thirty-five.

Present: Hon. MARTIN T. MANTON, Hon. AUGUSTUS N. HAND, Hon. HARRIE B. CHASE, Circuit Judges.

UNITED STATES, PLAINTIFF-APPELLANT

vs.

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

(Endorsement on cover:) United States Circuit Court of Appeals, Second Circuit. *United States* vs. *Bank of New York and Trust Company.* Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 27, 1935. William Parkin, clerk.

United States of America, Southern District of New York

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 226, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of United States, plaintiff-appellant, against Bank of New York and Trust Company, defendant-appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of June, in the year of our Lord one thousand nine hundred and thirty-five, and of the independence of the said United States the one hundred and fifty-ninth.

[SEAL] WM. PARKIN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1935

228 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

229 In Supreme Court of the United States

Stipulation and addition to record

Filed Oct. 30, 1935

Stipulation

It is hereby stipulated by and between counsel for the United States, counsel for the Bank of New York and Trust Company and counsel for the Assecuranz-Union von 1865, that the petition of intervention of the Assecuranz-Union von 1865 filed in the District Court of the United States for the Southern District of New York, together with the order of that court granting leave to intervene, certified copies of which papers are annexed hereto, may be included in and printed as part of the transcript of record in this court in the above-entitled cause.

Dated: October 29, 1935.

STANLEY REED,
Solicitor General, Counsel for the United States.
FREDERICK B. CAMPBELL,
Counsel for the Bank of New York and Trust Company.
HARTWELL CABELL,
Counsel for Assecuranz-Union von 1865.

230 United States District Court, Southern District of New York

In Equity No. 78–377

UNITED STATES OF AMERICA, COMPLAINANT,

against

BANK OF NEW YORK & TRUST COMPANY, DEFENDANT

This cause coming on to be heard on the application of Assecuranz Union von 1865 for leave to intervene in the above-entitled action and the application having been duly considered, and it appearing

to the Court that the said Assecuranz Union von 1865 is a party interested in the funds here in controversy, it is

Ordered, adjudged, and decreed that Assecuranz Union von 1865 has leave to intervene herein and to that end may appear in this action and file its petition of intervention within twenty days from the date of this order in the same manner and with like effect as if named in the original complaint as a party defendant and that its said petition of intervention be considered as an answer to complainant's complaint, and it is

Further ordered that the Clerk of this Court make the record of the entry of this order nunc pro tunc as of the date December 18, 1934, and it is

Further ordered that this order and entry thereof be without prejudice to any proceedings heretofore had in this cause.

Dated, New York, N. Y., January 31, 1935.

ALFRED C. COXE, *U. S. D. J.*

A True Copy:

[SEAL] CHARLES WEINER, *Clerk.*

230½ Please take notice that an order of which the within is a copy was duly entered and filed herein in the office of the Clerk of the United States District Court for the Southern District of New York at the Old P. O. Bldg., Borough of Manhattan, New York City, on the 1st day of February 1935.

Dated: New York, February 2, 1935.

CABELL, IGNATIUS, LOWN & BLINKEN,
Attorneys for Assecuranz Union von 1865,
150 Broadway, Borough of Manhattan, New York City.

Copy received 2/4/35.

EMMET, MARVIN & MARTIN,
Solicitors for Defendant.
By FREDERICK B. CAMPBELL,
Of Counsel.

Copy recpt. Feb. 4/35.

MARTIN CONBOY,
U. S. Atty.

231 United States District Court, Southern District of New York

UNITED STATES OF AMERICA, COMPLAINANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT

Petition of intervention of Assecuranz Union von 1865

Leave having been granted to the Assecuranz Union von 1865 by order of this Court dated January 31, 1935, and entered herein, to intervene in this action, comes now said Assecuranz Union von 1865 and files its intervention and for its cause of action alleges as follows:

I. The intervenor Assecuranz Union von 1865 is a foreign insurance corporation organized and authorized to do business under and by virtue of the laws of Germany with its principal place of business in the City of Hamburg.

II. That prior to the commencement of this action and on or about the 10th day of February, 1931, in a special proceeding entitled "In the Matter of the Application of the People of the State of New York, by James A. Beha, as Superintendent of Insurance, Respondent, for an order to take possession of the property of the Moscow Fire Insurance Company of Moscow, Russia, Appellant", an order was entered in the Court of Appeals of the State of

232 New York, directing the transfer or deposit of the surplus funds of the Moscow Fire Insurance Company remaining after the payment of all of its American creditors to one Paul Lucke as Conservator of the assets of the said Company; or, in the alternative, to a trust company.

III. That in accordance with said order of remittitur of the said Court of Appeals, the Supreme Court of the State of New York at a Special Term held in and for the County of New York, at the County Court House in the Borough of Manhattan, City of New York, on the 11th day of August, 1931, entered an order upon said remittitur from the Court of Appeals, which said order among other things provided as follows:

"(1) That the order and judgment of the Court of Appeals dated February 11, 1931, be made the order and judgment of this Court.

"(2) That the injunction contained in the liquidation order herein, dated and entered August 8, 1925, as resettled by order dated and entered September 11, 1925, be forthwith vacated and dissolved.

"(3) That all claims filed with the Superintendent of Insurance before the date of this order be determined within the instant liquidation proceeding according to law.

"(4) * * *

"(5) That the Superintendent of Insurance * * * is hereby directed to release, pay, transfer and deliver said surplus assets to

the Bank of New York and Trust Company of No. 48 Wall Street, New York City, as the agent or depositary of said Moscow Fire Insurance Company of Moscow, Russia, and of the said Paul Lucke as surviving director and conservator upon the filing with the Clerk of this Court of a written stipulation of said Moscow Fire Insurance Company and of said Paul Lucke as surviving director and conservator of said Company that such surplus assets or funds will not be withdrawn except upon the order of a Court of competent jurisdiction."

233 IV. That in accordance with said order so entered in the Supreme Court of New York County, the Superintendent of Insurance did on or about the 18th day of April 1933, transfer and pay over to the Bank of New York and Trust Company the sum of $1,080,399.54, being the residue of the American assets of said Moscow Fire Insurance Company after the payment of all claims and expenses theretofore allowed and incurred by the said Superintendent of Insurance in the liquidation of said Company.

V. That thereafter there was instituted in the Supreme Court of New York County a certain suit by the Moscow Fire Insurance Company of Moscow, Russia, and Paul Lucke as sole surviving director of the Moscow Fire Insurance Company and as conservator of its property against the Bank of New York and Trust Company as agent or depositary of said Moscow Fire Insurance Company of Moscow, Russia, and of said Paul Lucke as surviving director and against sundry corporations, firms and individuals, among them being the intervenor Assecuranz Union von 1865.

VI. That the purpose of said suit was the hearing and determining of claims against the Moscow Fire Insurance Company which had been filed or which would be presented for the purpose of having the same paid out of the said residue of said assets.

VII. That the intervenor Assecuranz Union von 1865 duly filed its claim in said proceedings.

234 VIII. That an order was made on or about the 13th day of October, 1933 in said Supreme Court appointing James F. Donnelly, Esq., Referee, to hear and determine all the issues in said action, among others the validity of the claim of the intervenor Assecuranz Union von 1865 against the assets of said Moscow Fire Insurance Company.

IX. That on due notice various and sundry hearings were had by the said Referee, in the course of which the intervenor Assecuranz Union von 1865 presented its proof of claim against the said assets.

X. That on or about August 22, 1934, the said Referee filed his report as Referee, and that in said report he found that the intervenor Assecuranz Union von 1865 was entitled to a judgment against the said assets in the sum of $4,506.56, which said sum includes the interest allowed by the said Referee.

XI. That a judgment for said sum in favor of the intervenor Assecuranz Union von 1865 was entered upon said report on or about the

22nd day of August 1934 and that by reason of the premises the intervenor Assecuranz Union von 1865 has a charge and lien on the funds here in controversy.

FOR ITS ANSWER TO THE COMPLAINT HEREIN THIS INTERVENOR ALLEGES:

XII. Denies each and every allegation contained in paragraphs marked "4" and "8" of the complaint herein.

XIII. Denies any knowledge or information sufficient to
235 form a belief as to each and every allegation contained in paragraph marked "6" of the complaint herein.

XIV. Except that the intervenor Assecuranz Union von 1865 has no knowledge or information sufficient to form a belief with respect to the allegations of complainant's demand and defendant's refusal as set forth in paragraph marked "7" of the complaint herein, this intervenor denies each and every other allegation in said paragraph "7" contained.

XV. This petition of intervention is filed in subordination to and in recognition of the propriety of the bill of complaint filed in this cause, if the complainant the United States of America has any right, title, claim, or interest in and to the cash, securities and other assets described in the complaint herein, but this intervenor denies that said complainant has any such right, title, interest, or claim to the aforesaid cash, securities and other assets and alleges that it (the intervenor) has a charge and lien upon said cash, securities, and assets as hereinbefore more fully set out.

Wherefore the intervenor, Assecuranz Union von 1865 prays that the charge and lien claimed by it herein on the cash, securities, and assets described in the complaint be established and declared to be a valid one, and for such other relief, legal or equitable, as this intervenor may be entitled to.

HARTWELL CABELL,
Solicitor for Assecuranz Union von 1865, Intervenor,
Office & P. O. Address, 150 Broadway, New York City.

236 STATE OF NEW YORK,
County of New York, ss:

HARTWELL CABELL, being duly sworn, deposes and says that he is the Solicitor for Assecuranz Union von 1865, the intervenor, in the foregoing action; that the foregoing petition of intervention is true to the knowledge of deponent except as to the matters which are therein stated to be alleged on information and belief and as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by the intervenor is that said intervenor is a foreign corporation and that there are no officers in the County wherein deponent has his office; that the source of the deponent's information and the grounds of his belief consist of correspondence in the possession of

deponent and the public records on file in the Supreme Court of the State of New York in and for the County of New York.

HARTWELL CABELL.

Sworn to before me this 11th day of February, 1935.

[NOTARY SEAL] JOSEPH S. CATALANO,
Notary Public.

Comm. expires Mar. 30, 1935.

A true copy:

CHARLES WEISER, *Clerk.*

[File endorsement omitted.]

Filed Oct. 30, 1935.

(Endorsement on cover:) File nos. 39,749, 39,750, 39,751. U. S. Circuit Court of Appeals, Second Circuit. Term No. 195. The United States of America, Petitioner, vs. Bank of New York and Trust Company. Term No. 196. The United States of America, Petitioner, vs. President and Directors of the Manhattan Company. Term No. 197. The United States of America, Petitioner, vs. Louis H. Pink. Petition for writs of certiorari and exhibits thereto. Filed July 1, 1935. Term Nos. 195 O. T. 1935, 196 O. T. 1935, 197 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 19

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 196

THE UNITED STATES OF AMERICA, PETITIONER

vs.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1935
CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 196

THE UNITED STATES OF AMERICA, PETITIONER

vs.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

AGAINST

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSOR to The Bank of Manhattan Trust Company, Defendant-Appellee

Statement under rule 13

On August 25, 1934, the above-entitled suit was commenced by the complainant, United States of America, against the defendant, President and Directors of The Manhattan Company, successor to The Bank of Manhattan Trust Company, by filing a verified bill of complaint in the District Court for the Southern District of New York and by the issuance of a subpoena.

On August 25, 1934, an order to show cause, supported by an affidavit, was signed, temporarily restraining defendant and requiring to show cause on August 28, 1934, why complainant's motion for an injunction pendente lite should not be granted. On August 25, 1934, the defendant was served with a subpoena, a copy of the bill of complaint and a copy of the order to show cause signed August 24th.

2 Argument was had before Honorable Alfred C. Coxe, United States District Judge, on October 4 and October 6, 1934. In an opinion dated November 28, 1934, and filed November 30, 1934, Judge Coxe denied complainant's motion for an injunction pendente lite and recited that he granted defendant's motion to dismiss the complaint for insufficiency. On December 20, 1934, an order and decree was filed denying complainant's motion for an injunction pendente lite and granting defendant's oral motion to dismiss the complait for insufficiency and suspending the operation of the order and decree until the determination of the appeal by the complainant. On December 22, 1934, the appeal was allowed.

In United States District Court

Subpoena

E. 78—383.

THE PRESIDENT OF THE UNITED STATES, TO PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSOR TO THE BANK OF MANHATTAN TRUST COMPANY, GREETING:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by United States of America, and to further do and receive what the said Court shall have considered in this behalf. And this you are

not to omit under the penalty on you of Two Hundred and Fifty ($250) Dollars.

Witness, Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, on the 25th day of August, in the year One Thousand Nine Hundred and Thirty-four and of the Independence of the United States the One Hundred and fifty-ninth.

CHARLES WEISER, *Clerk.*

MARTIN CONBOY,
U. S. Attorney, Solicitor for Complainant, U. S. Courts & P. O. Bldg., Broadway and Park Row, New York City.

The defendant is required to file its answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof, excluding the day of said service, otherwise the bill aforesaid may be taken Pro Confesso.

[SEAL] CHARLES WEISER, *Clerk.*

In United States District Court, Southern District of New York

Equity 78/383

UNITED STATES OF AMERICA, COMPLAINANT

AGAINST

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSOR to the Bank of Manhattan Trust Company, defendant

Complaint

To the Honorable Judges of the District Court of the United States for the Southern District of New York.

The United States of America, by its attorney, Martin Conboy, United States Attorney for the Southern District of New York, complains of the defendant herein and alleges on information and belief:

I

That the complainant herein is a corporation sovereign and body politic.

II

That the defendant was at all times hereinafter mentioned and now is a corporation organized and existing under and by virtue of the Banking Law of the State of New York, with its principal office and place of business at 40 Wall Street, Borough of Manhattan, City of New York, and is an inhabitant and resident of the Southern District of New York.

III

That the Northern Insurance Company of Moscow, Russia, at all the times hereinafter mentioned, with the exceptions hereinafter noted, was a corporation, organized under the laws of the State of Russia, to transact the business of insurance, and was authorized by compliance with the requirements of the laws of the State of New York to transact such business in this State; that the said insurance company, as part of its compliance with the requirements of the laws of the State of New York, deposited with the Superintendent of Insurance as a fund out of which should be paid the claims of domestic creditors of said corporation, cash, securities, and other items of value; that the Northern Insurance Company of Moscow possessed assets and items of value in the United States other than and in addition to the said fund deposited with the Superintendent of Insurance.

IV

That heretofore and in the latter part of 1917 and the early part of 1918, or thereabouts, the said Northern Insurance Company of Moscow, Russia, was by decree of the Russian State dissolved and all of its right, title, and interest and all the right, title, and interest of all its stockholders in its property, including the deposit
6 hereinbefore mentioned with the Superintendent of Insurance of the State of New York, and the other assets of the Northern Insurance Company in the United States hereinbefore mentioned, were confiscated and appropriated by the said Russian State.

V

That heretofore and on or about August 3, 1933, the claims of domestic creditors to the said fund so deposited with the Superintendent of Insurance of the State of New York having been satisfied, the said Superintendent of Insurance, pursuant to an order of the Supreme Court of New York, New York County, directing that the said fund be released, paid, transferred, and delivered to the defendant as agent or depositary of the said Northern Insurance Company of Moscow, Russia, said fund not to be withdrawn except upon the order of a court of competent jurisdiction, delivered to the defendant, and the defendant received from the said Superintendent of Insurance the balance of said fund then consisting of cash, securities, and other assets described as follows:

Cash	
City of New York corporate stock	$154,307.60
4¼% 1962 par value	16,000.00
Imperial Russian Govt. Bonds, 6½% 1919 par value	75,000.00
Total	245,307.60

that in addition to the aforesaid cash securities and other
7 assets, the defendant received from the Northern Insurance Company of Moscow, Russia, on or about March 13, 1934,

cash securities or other assets in the value of $87,686.45; and that all the said cash, securities, or other assets of the value of $332,994.05, or the avails thereof, are now in the possession of the said defendant.

VI

That on or about November 16, 1933, the Russian State assigned to the complainant, for a valuable consideration, all of its right, title and interest in and to the aforesaid cash, securities and other assets, and also assigned to the complainant all the right, title and interest of all Russian nationals in and to the aforesaid cash, securities and other assets, and since November 16, 1933, the complainant has been and now is the sole and exclusive owner, entitled to the immediate possession of the aforesaid cash, securities and other assets now in the possession of the defendant.

VII

That prior to the institution of this suit, complainant duly demanded of the defendant the said cash, securities and other assets, together with the proceeds and avails thereof, but the defendant has refused to deliver the same or any part thereof to the complainant and continues wrongfully to withhold the same from the complainant, and now wrongfully possesses the said cash, securities and other assets or the avails thereof. That as to the complainant since November 16, 1933, the possession of said property by the defendant has been wrongful and the defendant still wrongfully detains the same from the complainant.

8

VIII

That by reason of the defendant's possession of the said cash, securities and other assets received on or about August 3, 1933, pursuant to the aforesaid order of the State Supreme Court that the said cash, securities and other assets would not be withdrawn except upon the order of a court of competent jurisdiction and by reason of the defendant's possession of the said cash, securities and other assets received on or about March 13, 1934, and by reason of the complainant's demand for the said cash, securities and other assets and the increase and avails thereof and the proceeds thereof, and by reason of the defendant's wrongful refusal to deliver the same or any part thereof to the complainant, and by reason of the defendant's continuing to wrongfully withhold the same from the complainant, the defendant holds the same for the complainant as fiduciary and trustee for the complainant.

IX

The complainant has no complete, plain, and adequate remedy at law for the relief sought herein and therefore institutes this suit in equity.

Wherefore, the complainant prays:

(a) that a subpoena issue to the defendant named herein commanding it to appear on a certain day and answer this bill of complaint and to abide by such orders and decrees as this court may make in the premises;

9 (b) that the defendant herein, its successors, officers, agents, attorneys, employees, or assignees, and all persons or corporations acting under their direction or in their behalf, be enjoined and restrained permanently and pending the determination of this suit from paying out or distributing to anyone, other than this complainant, any part of the said cash, securities, and other assets or the avails thereof;

(c) that the defendant be required by a decree of this Court to make a full, just, and complete account under the direction of this Court, and to pay over to the complainant the aforesaid cash, securities and other assets and the proceeds and avails thereof and all interest, dividends, gains, and profits as have accrued or arisen or have been earned or received therefrom by the defendant and all such gains or profits as would have accrued to the complainant but for the wrongful detention of said cash, securities, and other assets by the said defendant and all damages the complainant may have suffered or sustained thereby;

(d) that the complainant may have such other and further relief as the case may require and the court may deem just in the premises.

MARTIN CONBOY,
United States Attorney for the Southern District of New York,
Attorney for Complainant.

Office & P. O. Address: U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

10 *Duly sworn to by Edward J. Ennis; jurat omitted in printing.*

11 In United States District Court, Southern District of New York

[Title omitted.]

Order to show cause

On the annexed affidavit of Edward J. Ennis, Assistant United States Attorney in and for the Southern District of New York, sworn to on the 24th day of August, 1934, on the verified bill of complaint filed herein on the 25th day of August 1934, and

It appearing to the satisfaction of this Court that the complainant is entitled to the relief demanded by the bill of complaint in this suit, and

It further appearing that in order to enable this Court to adjudicate the right of the complainant to the cash, securities and other

assets referred to in the complaint, and to effectively exercise its jurisdiction and enforce its judgment, it is necessary and proper that the aforesaid cash, securities and other assets remain in possession of the defendant pending the adjudication by this Court of the rights of the complainant, it is

12 Ordered that the defendant be and appear before this Court at a Stated Term thereof for the hearing of motions to be held on the 28th day of August, 1934, in Room 235 of the Old Post Office Building, in the City, County, and Southern District of New York, Borough of Manhattan, at the hour of 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, then and there to show cause, if any it has, why the defendant, its officers, agents, attorneys, employees, assignees, successors and all persons or corporations acting under its direction, or in its behalf, or in privity with it or claiming so to act, should not be enjoined and restrained as prayed for in the said bill of complaint herein, and meanwhile let the defendant, its officers, agents, attorneys, employees, assignees, successors and all perons or corporations acting under its direction, or in its behalf, or in privity with it or claiming so to act, be stayed, restrained, and enjoined from distributing any of the said cash, securities, and other assets pending the determination of this motion.

Let service hereof be made upon the defendant by service personally upon an officer or authorized agent of the defendant of a copy, which need not be certified, on or before August 25th, 1934.

Dated, New York, N. Y., August 25th, 1934.

HULBERT, *U. S. D. J.*

13 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit attached to order to show cause

Edward J. Ennis, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney for the Southern District of New York in charge of the above-entitled matter.

2. That the Northern Insurance Company of Moscow, Russia, at all the times hereinafter mentioned, with the exceptions hereinafter noted, was a corporation, organized under the laws of the State of Russia, to transact the business of insurance and was authorized by compliance with the requirements of the laws of the State of New York to transact such business in this State; that the said Insurance Company, as part of its compliance with the requirements of the laws of the State of New York, deposited with the

14 Superintendent of Insurance as a fund out of which should be paid the claims of domestic creditors of said corporations, cash, securities, and other items of value; that the said Insurance Company possessed other assets and items of value in the United States.

3. That heretofore and in the latter part of 1917, and the early part of 1918 or thereabouts, the said Northern Insurance Company of Moscow, Russia, by decrees of the Russian State, and particularly by a decree of the Russian State on the organization of the insurance business in the Russian Republic, a photostatic copy of a certified copy of which and a copy of a certified translation of which are attached hereto and made a part hereof, was dissolved and all of its right, title, and interest and all the right, title, and interest of all of its stockholders in its property, including the deposit hereinbefore mentioned with the Superintendent of Insurance of the State of New York, and including other assets and items of value of the said Insurance Company in the United States, were confiscated and appropriated by the said Russian State.

4. That heretofore and on or about August 3, 1933, the claims of domestic creditors to the said fund so deposited with the Superintendent of Insurance of the State of New York having been satisfied, the said Superintendent of Insurance, pursuant to an order of the Supreme Court of New York, New York County, directing
15 that the said fund be released, paid, transferred, and delivered to the defendant as agent or depositary of the said Northern Insurance Company, said fund not to be withdrawn except upon the order of a court of competent jurisdiction, delivered to the defendant, and the defendant received from the said Superintendent of Insurance, the balance of said fund then consisting of cash, securities, and other assets described as follows:

Cash	$154,307.60
City of New York Corporate Stock, 4¼% 1962, par value	16,000.00
Imperial Russian Government Bonds, 6½% 1919, par value	75,000.00
Total	245,307.60

that in addition to the aforesaid cash, securities, and other assets, the defendant received from the Northern Insurance Company of Moscow, Russia, on or about March 13, 1934, cash, securities, or other assets in the value of $87,686.45; and that all the said cash, securities, or other assets in the amount of $332,994.05, or the avails thereof are now in the possession of the said defendant.

5. That on or about November 16, 1933, the Russian State assigned to the complainant, for a valuable consideration, all of its right, title, and interest in and to the aforesaid cash, securities, and other assets, and also assigned to the complainant all the right, title, and interest of all Russian nationals in and to the aforesaid cash,
16 securities, and other assets, and since November 16, 1933, the complainant has been and now is the sole and exclusive owner entitled to the immediate possession of the aforesaid cash, securities, and other assets now in the possession of the defendant.

6. That in a proceeding in the Supreme Court of the State of New York, New York County, entitled "In the Matter of the Assignment of Northern Insurance Company of Moscow, Assignor" to "The President and Directors of The Manhattan Company, Suc-

cessor to the Bank of Manhattan Trust Company, Assignee for the Benefit of Creditors", a referee has been appointed to examine the account of the assignee and the claims filed with the assignee, and to report to the Court with respect to the said account and claims and with respect to a stipulation entered into by various creditors of said assignees.

7. That the referee appointed in the said State Court proceedings has approved certain claims of foreign creditors of the Northern Insurance Company of Moscow, Russia, and other claimants, aggregating the sum of approximately $50,000.00 and has signed formal reports thereon; that a motion is about to be made in the said State Court proceeding by the defendant herein to obtain an order by the Court authorizing the payment by the defendant to said foreign creditors and other claimants of the said claims approved by the Referee.

8. That prior to the institution of this suit, complainant
17 duly demanded of the defendant the said cash, securities, and other assets, together with the proceeds and avails thereof but the defendant has refused to deliver the same or any part thereof to the complainant.

9. That no application has been made to any court or judge for the relief prayed herein or for similar relief.

Wherefore, deponent makes this affidavit in support of a stay and an order to show cause why the defendant should not be enjoined and restrained permanently and pending the determination of this suit from paying out or distributing to anyone other than this complainant any part of the said cash, securities, and other assets or the avails thereof.

EDWARD J. ENNIS.

Sworn to before me, this 24th day of August 1934.

18 *Exhibit A—Certified copy of Russian text of a decree of the Russian State on the organization of the insurance business in the Russian Republic attached to affidavit verified August 24, 1934*

Certified Translation of Exhibit A

Source: Collection of Decrees and Orders on National Economy (October 25, 1918—March 15, 1919), Volume Two. Published by the Supreme Soviet of National Economy of the Russian Socialist Federated Soviet Republic, Moscow, 1920. Pages 720, 721.

Decree of the Soviet of People's Commissars

603. On the organization of the insurance business in the Russian Republic.

(1) Insurance in all its forms, such as: Fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, live-

stock insurance, insurance against failure of crops, etc., is hereby proclaimed as a State monopoly.

NOTE.—Mutual insurance of movable goods and merchandise by the cooperative organizations is conducted on a special basis.

(2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree
19 are subject to liquidation; former rural* (People's Soviet) and municipal mutual insurance organizations operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Republic.

(3) For the immediate organization of the insurance business and for the liquidation of insurance institutions which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

NOTE.—The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Federated Soviet Republic.

(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished not later than the first day of April, 1919.

(5) The Commissariat of Insurance and Fire Prevention,
20 together with all its institutions, is reorganized into the Insurance Department of the Supreme Soviet of National Economy. The matter of fire prevention is transferred to the Supreme Soviet of National Economy.

(6) No Soviet properties and enterprises are subject to insurance.

(7) Life insurance with the State Savings Banks is conducted upon the former basis.

(8) The present decree comes into force on the day of its publication.

(Signed)

Chairman of the Soviet of People's Commissars
V. ULYANOV (Lenin)
Administrator of Affairs of the Soviet of People's Commissars
V. BONCH-BRUEVICH

("IZVESTIYA of the All-Russian Central Executive Committee of Soviets," December 1, 1918, No. 263).

* zemskie.

[Translator's Note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

(Signed) IGNATIUS JAWNEY,
Principal Translator,
Department of State.

Appointed Translator, January, 1928.
Russian.
Tr. IJ:MW:SS.

21 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit of Andrew Wilson, Jr., in opposition to complainant's motion for injunction

STATE OF NEW YORK,
County of New York, ss:

Andrew Wilson, Jr., being duly sworn, deposes and says: I am a Vice President of the defendant banking corporation herein, and am familiar with the facts herein set forth, and have had charge of the administration of the trust reposed in my bank as assignee for the benefit of creditors of the Northern Insurance Company of Moscow.

I have read the complaint of the Government and the affidavit and order to show cause herein in which the Government seeks a judgment determining ownership in itself of the funds on deposit with my bank, and as incidental relief, seeks an injunction restraining the bank from disbursing any funds to creditors or others pending the hearing and determination of the action.

22 I ask that the application of the Government for an injunction restraining the bank from making such disbursements be denied for the following reasons:

1. The Northern Insurance Company of Moscow is a corporation organized and existing under and by virtue of the laws of the Empire of Russia, and was organized in said Empire in the year 1872; that in and about the year 1911, the said Company, after making the necessary deposits and otherwise complying with the requirements of the Insurance Laws of the State of New York, established its United States branch in the State of New York; that it was licensed to and did transact its appropriate business in said State and elsewhere in the United States until on or about the 17th day of April 1925, when the Superintendent of Insurance of the State of New York applied to this Court pursuant to Section 63 of the Insurance Law of this State for an order to take possession of the assets of said company for the benefit of its policyholders and creditors.

2. Upon information and belief that an order was entered in this Court, dated June 9, 1926, in a proceeding entitled "In the Matter

of the Application of the People of the State of New York by James A. Beha, as Superintendent of Insurance of the State of New York for an order to take possession of the property and assets of the Northern Insurance Company of Moscow, Russia, in the interests of its policyholders, creditors, stockholders, and
23 the public", directing the Superintendent of Insurance of the State of New York to take possession of the assets of the United States Branch of said Company and to liquidate the same under the direction of this Court; that thereafter the said Superintendent of Insurance entered upon his duties as liquidator of the said United States Branch; that on or about the 16th day of December 1932, said Superintendent of Insurance filed his fourth and final report as liquidator of the said Branch with this Court.

3. Upon information and belief the Superintendent of Insurance has paid in full, with interest, all the policyholders and creditors who had obtained their policies from or did business with or otherwise had claims against the said United States Branch in accordance with the rules laid down by the Court of Appeals in Matter of People v. Norske Lloyd Ins. Co., 242 N. Y. 148 and 249 N. Y. 139, and that the only creditors of said Company now remaining unpaid are such creditors who did business with the Company with other than its said United States Branch.

4. That after the payment of such creditors whom I have just referred to, there remained a surplus in the hands of the Superintendent of Insurance belonging to the Northern Insurance Company of Moscow. The Northern Insurance Company of Moscow demanded that the Superintendent of Insurance release and deliver such surplus assets to it, but this demand was refused, and an application was made to the Supreme Court of the State of New York for that relief.

24 5. The matter was passed upon successively by that Court, the Appellate Division of the Supreme Court in this Department, and the Court of Appeals of the State of New York, and on February 10, 1931, the Court of Appeals, after a careful consideration of all the facts and circumstances surrounding the application of the Northern Insurance Company of Moscow, rendered a decision directing the delivery of the surplus assets of the Northern Insurance Company of Moscow, then in the hands of the Superintendent of Insurance, to said Company. Such decision of the Court of Appeals fully recognized the continued existence of the corporation and the fact that it had title to the assets in this jurisdiction, and that it was entitled to receive such assets in spite of the opposition of the Superintendent of Insurance of the State of New York and others who contended that the Northern Insurance Company of Moscow was no longer in existence and that its corporate life had been dissolved and terminated as a result of the very decree relied upon by the Government in this case.

6. The Court, in its decision, which will be found reported in 255 N. Y., page 433, ordered the release of the surplus assets to its then

existing directors upon the terms and conditions contained in the decision of the Court.

7. Just immediately prior to this decision, the Court of Appeals had upheld the corporate existence of the same company and had also supported its contention that it had a right to preserve its
25 assets and collect its claims in a decision reported in 255 N. Y. 120, known as Severnoe against London & Lancashire Insurance Company. However, the Court in that decision held that it would not affirm the judgment against the defendant because the corporation then lacked a quorum. After the direction of the Court of Appeals, which ordered the Superintendent of Insurance to release the surplus assets of the Company to it, it again recognized its continued existence and its title to the assets then in the possession of the Superintendent of Insurance and now in the possession of this bank, by a decision rendered on April 28th, 1933, wherein it directed that the Superintendent of Insurance turn the surplus assets over to the bank as an agent or depositary of the Northern Insurance Company of Moscow.

8. The Supreme Court of the State of New York, in and for the County of New York, thereafter sanctioned and approved an assignment made for the benefit of creditors on behalf of the Northern Insurance Company of Moscow or the 6th day of May 1932 which was filed and recorded in the Office of the Clerk of the County of New York on the 28th day of June 1932, and a bond in connection with which was filed by the bank as assignee, and approved by one of the Justices of such Court on the 2nd day of July 1932. On the following day, the bank filed an inventory and a schedule of the assignor's creditors, and since that date has been duly administering the trust reposed with it pursuant to the provisions of the Debtor and Creditor Law of the State of New York.

26 9. On the 13th day of November 1933, the Supreme Court of the State of New York duly entered its order directing the Bank, as agent or depositary of the Northern Insurance Company of Moscow, to deliver to itself, as assignee for the benefit of creditors of the Northern Insurance Company of Moscow, all funds then remaining in its hands as agent or depositary of said company. That since its appointment and acceptance of the trust as assignee, there has come into its hands a total of $249,813.03 in assets belonging to the Northern Insurance Company of Moscow, and claims of creditors have been made against such funds, excluding disbursements of your petitioner, attorneys' fees and commissions, in the amount of $271,723.22. The claimants in number aggregate nineteen, the greater part of which comprise citizens of the United States or nationals of friendly countries.

10. I depose and say that it was strenuously urged in the various proceedings I have referred to in the Court of Appeals that the company had no standing to maintain the proceeding to reclaim its assets and that a dissolution had been effected by reason of the decrees of the Soviet Government and these matters were presented

with the greatest consideration and deliberation by the parties who were interested in such appeals and the Court of Appeals overruled all of these arguments and either specifically or in effect held that the company was a continuing, functioning corporate entity, and entitled to maintain a proceeding to recover its credits and assets and to distribute them among its creditors and/or stockholders.

27 11. I further depose and say that since the filing of claims with the bank that a careful examination of such claims has been made, and their validity and propriety determined, and to render available a sum in favor of the stockholders a stipulation was effected by and between a number of the creditors whereby the amounts of their claims as filed were reduced and an agreement was made to accept a lesser sum than the face amount of the claim.

12. On or about May 25, 1934, the petition and account of the assignee were duly filed in the Supreme Court of the State of New York in and for the County of New York, and an order was thereupon issued providing for the appointment of a Referee to take and state the account of the assignee herein and to hear any and all objections made and filed to any claims, and to report to the Court with respect to all of the claims of the creditors filed with the assignee as to their validity and proper amounts, and in and by the terms of such order, John Godfrey Saxe, of No. 1 Cedar Street, Borough of Manhattan, City of New York, was duly appointed to take such proof and to take and state the account of the assignee pursuant to the order of the Court, which order was entered on July 7, 1934. The Referee has taken proof with respect to certain claims, and has duly made and rendered his report in writing approving claims aggregating approximately $50,000.00.

28 13. I am advised and verily believe that all of these facts have been known to the Government and until the application, which is now before this Court, was made, no attempt was made by the Government to interfere or intervene in this proceeding or otherwise.

14. I am advised that the Supreme Court of the State of New York has acquired jurisdiction of the assets now in the possession of the bank for distribution and the Government will have an ample opportunity in the proceeding which is now being conducted in the State Court to assert its contention that it is entitled to receive the assets in the bank by virtue of the alleged assignment received from the Soviet Government on November 16, 1933.

15. I further depose and say that the issuance of an injunction by this Court, while directed against the bank as a party defendant in this suit to stay the bank from the disbursement of any funds, is, nevertheless, nothing more or less than an effort to obtain an injunction from a Federal Court staying the prosecution or enforcement of the decree or order of a State Court, and that such relief is an interference with the rights and remedies available to the parties who have come within the jurisdiction of the State Court proceeding.

16. I further depose and say that the assets now in the possession of the bank were not either prior to or at the time of the enactment of the Soviet decree, which is relied upon by the
29 Government herein, located within the territorial confines of the Soviet Government, but, on the contrary, were within the possession of the Superintendent of Insurance of the State of New York, and formed a part of the trust fund for deposit required in or for the Northern Insurance Company of Moscow to conduct a United States branch here, although the Government in its complaint and in the affidavit relied upon for the purpose of obtaining an injunction here was only referred to in the most general way.

17. With respect to its source of title relied upon to seize or obtain the assets with the bank, I am informed and verily believe that it will be contended, and is contended by the Government that it rests its claim upon a certain letter dated the 16th day of November, 1933, from Maxim Litvinoff, the representative of the Union of Soviet Socialist Republics, directed to Hon. Franklin D. Roosevelt, President of the United States of America, which letter, and its acknowledgment, constitute the executive agreement or treaty between our country and the Soviets. I particularly desire to call the Court's attention, as a ground for denying any injunction herein, and as indicating the very feeble basis of the Government's position, that the treaty or executive agreement between the two Governments, by its language, specifically refers to "amounts * * * that may be found to be due * * * from American nationals." An examination of the documents passing between the two Governments very clearly shows that there was no attempt to assign any amount found to be due from a Russian national.

30 18. I depose and say that the President and Directors of the Manhattan Company owes no money to the Soviet Government or any of its predecessor Governments arising out of the matters set forth in the complaint, and it is very clear from an examination of the complaint that the only reason the bank is joined as a defendant herein is because it happens to be the assignee for the benefit of creditors of the Northern Insurance Company of Moscow.

19. I have read the decree which is appended to the moving papers and which purports to liquidate the Northern Insurance Company of Moscow, and I direct the Court's attention to the fact that such decree does not by its terms confiscate or appropriate the property of the Northern Insurance Company of Moscow, but it merely directs the liquidation of such company.

20. I depose and say that the plaintiff has an adequate remedy at law, and in connection therewith, direct the Court's attention to the fact that the Government has fully recognized this fact by the institution of an action at law against the bank as assignee for the benefit of creditors of the Second Russian Insurance Company, which is a company organized under the laws of the Empire of Russia, and which was likewise admitted to do business in this State, and in connection with which it was likewise claimed

was dissolved by the Russian decrees. I therefore say that by the commencement of such action at law, as above noted and referred to, the Government has recognized and demonstrated that it
31 has an ample and adequate remedy without recourse to a Court of Equity. Furthermore, the moving papers relied upon by the Government herein utterly fail to show any equitable grounds for the issuance of an injunction or for a stay of proceedings on the part of the bank in administering this trust. The moving papers and the complaint can be examined with care and they will be found to be barren of any allegations justifying this Court to issue its mandate restraining the bank from continuing to distribute the assets acquired by it as assignee for the benefit of creditors of the Northern Insurance Company of Moscow.

21. I further depose and say that an examination of the decree annexed to the moving papers of the Government will disclose that the obvious and clear intent of the Soviets in enacting such legislation, if it thought it was seizing any assets, was to limit such seizure to those which might pass into its hands after a liquidation and a payment of all claims, and a satisfaction of all debts against the Company.

22. I am advised and verily believe and urge it as a ground for denying this injunction, that such decree of liquidation did not operate on any property without the confines of Russia and certainly not on the property now within the possesion of this bank, and therefore had no extra-territorial effect.

23. I am advised and verily believe that the Courts of this
32 State, and more particularly the Court of Appeals, in decisions which will be referred to in the brief or memorandum of law to be submitted herein on behalf of the bank, have repeatedly held that the decrees of the Soviet Government, including the one relied upon by our Government herein, are decrees of a confiscatory nature, appropriating without compensation or due process of law, the property of others, are repugnant and in derogation of the public policy of not only our State, but of our Federal Government, and therefore no force or effect has ever been given to them in any Court in this State or in any other State in this Union.

24. For the reasons herein asserted, I respectfully ask that the motion of the Government for an injunction herein be denied and the stay contained in the order of this Court, dated the 25th day of August, 1934, be vacated.

ANDREW WILSON, JR.

Sworn to before me this 31st day of August, 1934.

[SEAL] A. S. CONDIT, JR.,
Notary Public.

Queens Co. No. 3389, Reg. No. 7849. Cert. filed in N. Y. Co. No. 887, Reg. No. 5C562. Cert. filed in Kings Co. No. 82, Reg. No. 5387. Cert. filed in Bronx Co. No. 39, Reg. No. 146C35. Certificate filed in Richmond County. Commission expires March 30, 1935.

33 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit of Robert J. Sykes, in opposition to complainant's motion for injunction

STATE OF NEW YORK,
County of New York, ss:

Robert J. Sykes, being duly sworn, deposes and says:

I am an attorney-at-law, and a member of the firm of Rumsey & Barker, solicitors for the defendant herein. I make this affidavit in opposition to the motion of the Government for an injunction pendente lite.

In the affidavit of the defendant Bank submitted herein in opposition to such application of the Government to enjoin the Bank from distributing the funds in its possession, the Court will note a frequent reference to various orders and decrees of the Supreme Court. I have annexed them hereto and they are marked respectively
34 Exhibits A, B, C, D, E, F, and G. A brief description of these orders is as follows:

Exhibit A—Order of New York Supreme Court dated April 2, 1931. This order directs the Superintendent of Insurance, pursuant to the decision of the Court of Appeals, to release the surplus assets of the Northern Insurance Company to it and its directors.

Exhibit B—Order of Appellate Division dated July 6, 1931, affirming the order referred to in Exhibit A.

Exhibit C—Order of New York Supreme Court directing the qualification of the President and Directors of the Manhattan Company as Assignee.

Exhibit D—Order of New York Supreme Court directing and authorizing defendant Bank to advertise for creditors.

Exhibit E—Order of New York Supreme Court dated the 6th day of June 1933, directing the Superintendent of Insurance to deliver, transfer and release the surplus funds of the Northern Insurance Company of Moscow to the defendant Bank as agent or depositary.

Exhibit F—Order of New York Supreme Court dated November 13, 1933. This is an order authorizing and directing the defendant Bank as agent or depositary of the Northern Insurance Company of Moscow to deliver to itself as Assignee the funds of the Northern Insurance Company.

35 Exhibit G—This is an order of the New York Supreme Court dated July 7, 1934, directing the appointment of a Referee to take and state the account of the Assignee and pass upon claims filed with it.

ROBERT J. SYKES.

Sworn to before me this 12th day of September, 1934.

ALVIN R. YOUNG,
Notary Public.

New York County. Clerk's No. 10, Register's No. 6Y19. Kings County Clerk's No. 57. Kings Co. Register's No. 6017. Commission expires March 30, 1936.

36 *Exhibit "A", attached to affidavit of Robert J. Sykes*

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York at the County Court House in the Borough of Manhattan, City of New York, on the 2nd day of April, 1931.

Present: Hon. Philip J. McCook, Justice.

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE OF New York, by James A. Beha, as Superintendent of Insurance of the State of New York, for an order to take possession of the property and assets of the Northern Insurance Company of Moscow.

IN THE MATTER OF THE APPLICATION OF NORTHERN INSURANCE COMpany of Moscow and sundry creditors thereof for the approval of a plan for the disposition of the surplus assets of said company.

37 An order having been duly made and entered herein by this Court on June 9, 1926, directing the Superintendent of Insurance of the State of New York to take possession of the property and conserve the assets in the United States of America of the Northern Insurance Company of Moscow and to retain such possession and conserve such assets until the further order of this Court, and said Superintendent of Insurance having taken possession of such assets pursuant to said order, and further orders dated September 7, 1929, and September 10, 1929, respectively, having thereafter been made and entered by this Court directing the disposition of the surplus assets of said Company remaining after such liquidation, and cross appeals having been duly taken to the Appellate Division, First Department, by the Superintendent of Insurance and by the Northern Insurance Company and others from said last mentioned orders, and said Appellate Division having modified and affirmed said orders and the said Northern Insurance Company of Moscow and others having thereafter appealed to the Court of Appeals from said order of modification and affirmance of the Appellate Division, and the Court of Appeals having duly heard and considered said appeal and having thereupon made an order dated February 10, 1931, reversing the said order of the Appellate Division as well as the said orders of this Court dated September

7, 1929, and September 10, 1929, respectively, and the remittitur of said Court of Appeals dated February 10, 1931, having been duly filed in the office of the Clerk of this Court on March 12, 1931, and the said Northern Insurance Company of Moscow,
38 et al., appellants, having thereupon moved for an order making the said order of the Court of Appeals the order of this Court, and said motion having duly come on to be heard on March 11, 1931.

Now, upon reading and filing the notice of said motion dated March 6, 1931, together with due proof of service thereof, and upon said remittitur dated February 10, 1931, and upon the record on appeal and upon said orders heretofore made and entered herein dated September 7, 1929, and September 10, 1929, respectively, and upon all other papers and proceedings herein, all read in support of said motion, and said motion having been submitted without oral argument and due deliberation thereon having been had, and on motion of Bonynge & Barker, attorneys for the Northern Insurance Company of Moscow et al., appellants, upon filing the opinion of the Court, it is

Ordered that said motion be and the same hereby is in all respects granted and the aforesaid remittitur of the Court of Appeals dated February 10, 1931, and filed in the office of the Clerk of this Court on March 12, 1931, is hereby made the order, judgment, and decree of this Court, and it is

Further ordered that the injunction contained in said order of June 9, 1926, be and the same hereby is vacated and set aside, and it is

39 Further ordered that the Superintendent of Insurance of the State of New York be and he hereby is authorized and directed to release, transfer, and deliver the surplus assets of the Northern Insurance Company of Moscow to Boris Schwetzoff and Nicholas Goutchkoff, as directors and conservators, and to Nicholas Andre, as Managing Director and conservator of said Northern Insurance Company of Moscow, upon their filing with the Clerk of this Court a duly approved Surety Company bond in a sum equal to the value of the assets so to be released, transferred, and delivered and in the following form:

"Know all men by these presents that Northern Insurance Company of Moscow, a Russian corporation, Boris Schwetzoff and Nicholas Goutchoff, both of Paris, France, individually and as directors and conservators of said Northern Insurance Company of Moscow, and Nicholas Andre, of Paris, France, individually and as Managing Director and conservator of said Northern Insurance Company of Moscow, all as Principals, and (insert name of Surety) Surety Company, a corporation having an office at in the City and State of New York, as Surety, are held and firmly bound unto the People of the State of New York, as Obligee, in the sum of Dollars, lawful

money of the United States, to be paid to the said People, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally firmly by these presents.

Signed, sealed, and dated this day of , 1931.

Whereas, by an order dated June 9, 1926, duly made at a Special Term of the Supreme Court of the State of New York held in and for the County of New York, the Superintendent of Insurance of the State of New York was directed to take possession of the property and conserve the assets in the United States of America of the Northern Insurance Company of Moscow and to retain such possession and conserve such assets until the further order of said Court; and

Whereas, said Superintendent of Insurance, having completed the liquidation of said Northern Insurance Company of Moscow, now has in his hands surplus assets of said Company amounting to the sum of Dollars; and

Whereas upon an appeal to the Court of Appeals from an order of the Appellate Division of the Supreme Court of the State of New York, First Department, modifying and affirming two orders dated September 7, 1929, and September 10, 1929, respectively, made and entered at a Special Term of said Supreme Court of the State of New York held in and for the County of New York, the Court of Appeals sent down its remittitur dated February 10, 1931, whereby it directed that the surplus assets of said Northern Insurance Company of Moscow be released and delivered unto the above named Boris Schwetzoff, Nicholas Goutchoff and Nicholas Andre, conditioned upon their giving a bond of the tenor hereof; and

Whereas said remittitur was duly filed in the office of the Clerk of the County of New York on the 12th day of March, 1931, and thereupon an order was duly made and entered on the 2nd day of April 1931, at a special term of the Supreme Court of the State of New York held in and for the County of New York making the aforesaid judgment and order of the Court of Appeals the judgment and order of the Supreme Court;

Now, therefore, the condition of this obligation is such that if the above bounden Boris Schwetzoff Nicholas Goutchkoff and Nicholas Andre shall faithfully apply the assets of the Northern Insurance Company of Moscow to be released and delivered to them by the Superintendent of Insurance of the State of New York to the use of said Northern Insurance Company of Moscow, its creditors and shareholders, then this obligation shall be null and void, otherwise to remain in full force and effect, and in case of breach of the condition, to be enforcible by the Northern Insurance Company of Moscow or by any creditor or shareholder thereof affected thereby.

In witness whereof, the Principals and Surety have caused this bond to be duly signed and sealed the day and year first above written.

NORTHERN INSURANCE COMPANY OF MOSCOW,
By ----------,
Director.
----------,
Director.
----------,
Managing Director.
---------- L. S.),
Individually and as Director and Conservator.
---------- L. S.),
Individually and as Director and Conservator.
---------- L. S.),
Individually and as Managing Director and Conservator.
---------- SURETY COMPANY,
(Insert name)
By ----------,
And ----------

43 and it is

Further ordered that in the event that the said Boris Schwetzoff, Nicholas Goutchkoff, and Nicholas Andre shall fail to file such bond, duly approved, with the Clerk of this Court within ninety days after the entry of this order, or in the event that they shall sooner file with the said Clerk a written statement of their inability or unwillingness to furnish such bond, then and in either of such events the said Superintendent of Insurance of the State of New York, upon the filing herein of a written stipulation signed by the Northern Insurance Company of Moscow, Boris Schwetzoff, Nicholas Goutchkoff, and Nicholas Andre, that the fund will not be withdrawn except upon the order of a Court of competent jurisdiction, is hereby authorized and directed to release, transfer, and deliver said surplus assets of the Northern Insurance Company of Moscow to the Liberty National Bank & Trust Company, of the City of New York, as agent or depositary, the same to be held by said Trust Company subject to the further order of this Court, and it is

Further ordered that any party to this proceeding and the said Boris Schwetzkoff, Nicholas Goutchkoff, and Nicholas Andre, and any creditor or stockholder of said Northern Insurance Company of Moscow, and each of them, may from time to time hereafter apply to the Court upon the foot of this order for such further order, direction, or relief as they may be advised.

Enter,

P. J. McC., J. S. C.

44 *Exhibit "B", attached to affidavit of Robert J. Sykes.*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 6th day of July 1931.

Present: Hon. EDWARD R. FINCH,
Presiding Justice.
" EDGAR S. K. MERRELL,
" JOHN V. MCAVOY,
" FRANCIS MARTIN,
" HENRY L. SHERMAN,
Justices.

7471. Affirmance of Order

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE OF New York, by James A. Beha, as Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of Northern Insurance Company of Moscow, and the interests of its policyholders, creditors, stockholders, and the public.

IN THE MATTER OF THE APPLICATION OF NORTHERN INSURANCE COMpany of Moscow and sundry creditors thereof for the approval of a plan for the disposition of the surplus assets of said Company.

45 An appeal having been taken to this Court by the superintendent of insurance of the State of New York from an order of the Supreme Court, New York County, entered on the 2nd day of April 1931, granting a motion of the Northern Insurance Company and others to make the remittitur of the Court of Appeals herein, filed on the 12th day of March 1931 the order, judgment, and decree of the Supreme Court, except so far as said order vacates the injunction in the liquidation order entered on the 9th day of June 1926 and from an order of said court, denying motion to resettle said order, entered on the 27th day of April 1931 and said appeal having been argued by Mr. James F. Donnelly, of counsel for the appellant, and by Mr. Robert J. Sykes, of counsel for Northern Insurance Company of Moscow and others, and by Messrs. Campbell and Whipp, attorneys for claimant-respondent, Michael Imchanitsky and Moscow Fire Insurance Company; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby modified to the extent of striking therefrom, as well as from the proposed bond, the name of Nicholas Andre, as one of the persons to whom the surplus assets of the Northern Insurance Company of Moscow are to be delivered, and as so modified affirmed without costs. E. R. F., *P. J.*

46 *Exhibit "C", attached to affidavit of Robert J. Sykes*

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York at the court house thereof, in the borough of Manhattan, on the 2nd day of July 1932.

Present: Hon. John L. Walsh, Justice.

IN THE MATTER OF THE ASSIGNMENT OF NORTHERN INSURANCE Company of Moscow, assignor, to Bank of Manhattan Trust Company, assignee, for the benefit of creditors

Upon reading and filing the annexed petition of Bank of Manhattan Trust Company, the assignee herein, and it appearing to my satisfaction that the value of the assignor's estate is unknown, now, on motion of Bonynge & Barker, attorneys for the assignee, it is

Ordered that Bank of Manhattan Trust Company, the assignee herein, qualify as such assignee upon the filing of a provisional bond duly approved by one of the Justices of this Court in the sum of One thousand Dollars, for the faithful performance of its duties as such assignee.

Enter, J. L. W., *J. S. C.*

47 *Exhibit "D", attached to affidavit of Robert J. Sykes*

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House thereof, in the Borough of Manhattan, City of New York, on the 23rd day of August 1932.

Present. Hon. Samuel I. Rosenman, Justice.

IN THE MATTER OF THE ASSIGNMENT OF NORTHERN INSURANCE Company of Moscow, Assignor, to Bank of Manhattan Trust Company, Assignee for the benefit of creditors

Upon reading and filing the annexed petition of Bank of Manhattan Trust Company, Assignee for the benefit of creditors herein, duly verified the 22nd day of August 1932.

Now on motion of Bonynge & Barker, attorneys for the Assignee, it is

Ordered that Bank of Manhattan Trust Company, Assignee of said trust estate, be and it hereby is authorized and empowered to advertise by publication for creditors to present to it their
48 claims against the said Northern Insurance Company of Moscow, with vouchers duly verified, on or before a day to be specified in said advertisement or notice at least ten (10) days from said publication thereof which said advertisement or notice shall be published once in the New York Law Journal, a newspaper published in the County of New York, and hereby designated as most likely to give notice to persons to be served, and it is further

Ordered that a copy of said notice or advertisement requiring creditors to present their claims be mailed to each such creditor whose name appears on the schedules of the assignee, with postage thereon prepaid so that notice shall be received by them at least thirty (30) days before the day specified in said advertisement, with envelopes endorsed as specified in Rule 12, Subdivisions 14 and 25 of the Special Term Rules.

Enter,

S. I. R., *J. S. C.*

49 *Exhibit "E", attached to affidavit of Robert J. Sykes*

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, on the 6th day of June 1933.

Present: Hon. Phoenix Ingraham, Justice.

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE of New York, by James A. Beha, as Superintendent of Insurance of the State of New York, for an order to take possession of the property and assets of the Northern Insurance Company of Moscow

IN THE MATTER OF THE APPLICATION OF NORTHERN INSURANCE COMPANY of Moscow and sundry creditors thereof for the approval of a plan for the disposition of the surplus assets of said Company

An order having been entered herein on the 2nd day of April 1931, on the remittitur of the decision of the Court of Ap-
50 peals (255 N. Y. 433), which order on remittitur was modified by an order of the Appellate Division of the Supreme Court, made July 6, 1931, and filed in the office of the Clerk of this Court July 8, 1931, and Boris Schwetzkoff and Nicholas Goutchkoff, the surviving directors of the Northern Insurance Company of Moscow, and the Conservators of its property, having qualified to receive the surplus funds of the Northern Insurance Company of Moscow, under the provision of the decision of the Court of Appeals herein (255 N. Y. 433); and under the provisions of the order of this Court entered herein the 2nd day of April 1931, as modified, by filing in the office of the Clerk of this Court on the 8th day of August 1931, a surety company bond duly approved by this Court, in the amount of Five hundred thousand Dollars ($500,000.00), for the faithful performance of their duties as Directors and Conservators of the Northern Insurance Company of Moscow, and of its property, and an order having been duly made and entered in the office of the Clerk of the Court of Appeals, dated the 7th day of March 1933, granting a reargument of the cause in the Court of Appeals, and an order having been duly made herein the 9th day of March 1933, directing the Clerk of this Court to return

to the Court of Appeals the remittitur heretofore filed herein for further action thereon by the Court of Appeals, and a reargument of the above entitled cause having been had on the 14th day of March 1933, and the Court of Appeals, by its decision dated the 28th day of April 1933 (262 N. Y. 1), having modified its
51 prior decision (255 N. Y. 433), and having found that Boris Schwetzoff and Nicholas Goutchkoff were unwilling to act as Conservators of such surplus funds, ordered and adjudged that the surplus funds of the Northern Insurance Company of Moscow may be turned over to the Bank of Manhattan Trust Company and that a receipt from said Bank of Manhattan Trust Company may be taken by the Superintendent of Insurance as a good and valid receipt and acquittance for such surplus funds with the same force and effect as if the Conservators had not qualified to receive the surplus funds under the prior decision of the Court of Appeals (255 N. Y. 433), and as if the said Bank of Manhattan Trust Company had been named as agent or depositary under the second provision of the order of this Court, dated the 2nd day of April 1931, as modified, to receive said funds in the event of the failure of the Directors to qualify upon the stipulation of the Northern Insurance Company of Moscow and the said Bank of Manhattan Trust Company, that said funds will not be withdrawn except upon the order of a court of competent jurisdiction, and that said Court of Appeals having otherwise ratified and confirmed its prior decision (255 N. Y. 433),

Now, upon reading and filing the remittitur of the Court of Appeals dated April 28, 1933, and the record on appeal herein, and upon the remittitur of the Court of Appeals dated February 10, 1931, and upon the order of this Court entered thereon the 2nd day of April 1931, as modified by the order of the Appellate Division of the Supreme Court, made July 6, 1931, and filed in
52 the office of the Clerk of this Court July 8, 1931, and upon the papers on the reargument of the above entitled cause in the Court of Appeals and upon the bond filed herein by the Conservators, and upon all other papers and proceedings had herein, and due deliberation thereon having been had, and on motion of Barker, Perrigo & Bonynge, attorneys for the Northern Insurance Company of Moscow, et al., appellants, it is

Ordered that said motion be and the same hereby is in all respects granted and the aforesaid remittitur of the Court of Appeals, dated April 28, 1933, is hereby made the order, judgment, and decree of this Court, and it is

Further ordered that the surety company bond of the National Surety Company heretofore filed herein by the Northern Insurance Company of Moscow by Boris Schwetzoff and Nicholas Goutchkoff, the surviving Directors of the Northern Insurance Company of Moscow, and the Conservators of its property, be and the same hereby is cancelled, and it is

Further ordered that the provisions in the order of this Court dated the 2nd day of April 1931, providing for the delivery of the surplus funds of the Northern Insurance Company to Boris Schwetzoff and Nicholas Goutchkoff under a surety company bond to be filed by them, be and the same hereby are vacated and set aside, and it is

Further ordered that the Superintendent of Insurance of
53 the State of New York, upon the filing herein of a written stipulation signed by the Northern Insurance Company of Moscow by Boris Schwetzoff and Nicholas Goutchkoff, its surviving Directors and the Conservators of its property, and by the Bank of Manhattan Trust Company, that the funds will not be withdrawn except upon the order of a court of competent jurisdiction, is hereby authorized and directed to release, transfer and deliver said surplus funds of the Northern Insurance Company of Moscow to the Bank of Manhattan Trust Company of the City of New York, as agent or depositary, the same to be held by said Trust Company subject to the order of a court of competent jurisdiction, and it is

Further ordered that the Superintendent of Insurance of the State of New York may take the receipt of the Bank of Manhattan Trust Company as agent or depositary of Northern Insurance Company of Moscow as a good and valid receipt and acquittance for the delivery of such surplus funds to said Bank of Manhattan Trust Company, and it is

Further ordered that any party to this proceeding and the said Boris Schwetzoff and Nicholas Goutchkoff and any other creditor or stockholder of said Northern Insurance Company of Moscow and each of them may from time to time hereinafter apply to the Court upon the foot of this order for such further order, direction, or relief as they may be advised.

Enter,

P. I., *J. J. C.*

54 Supreme Court of the State of New York

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE of New York, by James A. Beha, as Superintendent of Insurance of the State of New York, for an order to take possession of the property and assets of the Northern Insurance Company of Moscow

IN THE MATTER OF THE APPLICATION OF NORTHERN INSURANCE COMpany of Moscow and sundry creditors thereof for the approval of a plan for the disposition of the surplus assets of said Company

It is hereby stipulated and agreed that the above attached order is approved as to form and that the same may be entered without further notice from any party as to the other.

Dated, New York, June 2, 1933.

BARKER, PERRIGO & BONYNGE,
Attorneys for Northern Insurance Company, et al.
COUDERT BROTHERS,
Attorneys for Nicholas Andre.
JOHN M. DOWNS,
Attorney for Superintendent of Insurance as Liquidator.

55 *Exhibit "F", attached to affidavit of Robert J. Sykes*

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 13th day of November 1933.

Present: Hon. Albert Cohn, Justice.

IN THE MATTER OF THE ASSIGNMENT OF NORTHERN INSURANCE COMPANY of Moscow, Assignor, to President and Directors of The Manhattan Company, Successor to The Bank of Manhattan Trust Company, Assignee, for the benefit of Creditors.

An order having been entered herein on the 13th day of October 1933, upon the petition of Nicholas Goutchkoff, Boris Schwetzoff, Igor Kistiakovsky, Paul Bouryschkine, Eugene Samoiloff,
56 Cazimir Korzenicki, Nicholas Federoff, Carl O. Von Hollitscher, Low & Bonar, Ltd., A/S Forsikringszelskapet Minerva and Scandinavian Insurance Company, Ltd., creditors of the Northern Insurance Company of Moscow, verified the 10th day of October 1933, which order directed the President and Directors of the Manhattan Company, successor to The Bank of Manhattan Trust Company as agent or depositary of the Northern Insurance Company of Moscow to show cause before this Court at a Special Term, Part I thereof, on the 27th day of October 1933, why an order should not be entered herein directing the said President and Directors of the Manhattan Company, successor to the Bank of Manhattan Trust Company as agent or depositary of the Northern Insurance Company of Moscow to pay over the funds held by them of the Northern Insurance Company of Moscow to the said President and Directors of the Manhattan Company as assignee for the benefit of creditors of the Northern Insurance Company of Moscow, that the said funds may be made available for distribution among the creditors of the said Northern Insurance Company of Moscow in this proceeding pursuant to the orders of this Court, and it appearing by said petition that this Court by its order dated the 6th day of June 1933, entered upon the remittitur of the order of the Court of Appeals dated the 28th day of April 1933, in a proceeding in

this Court entitled "In the Matter of the Application of the People of the State of New York, James A. Beha, Superintendent of
57 Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of creditors of the Northern Insurance Company of Moscow, Russia, and the interest of its Policyholders, Creditors, Stockholders, and the Public", directed the Superintendent of Insurance of the State of New York to release, transfer, and deliver the surplus funds of the Northern Insurance Company of Moscow to the Bank of Manhattan Trust Company as agent or depositary of the Northern Insurance Company of Moscow, the same to be held by said Trust Company subject to the order of a court of competent jurisdiction, and directed to the said Superintendent of Insurance to take the receipt of the said Trust Company as agent or depositary of the Northern Insurance Company of Moscow, as a good and valid receipt and acquittance for the delivery of such surplus funds to the said Trust Company, and it appearing that the Superintendent of Insurance has delivered the surplus funds of the Northern Insurance Company to the said Trust Company as agent or depositary.

Now, upon reading the said petition exhibits annexed and order to show cause and the notice of entry thereof, and upon filing the notice to creditors dated October 18, 1933, the affidavit of Helen L. Blain, sworn to the 28th day of October 1933 showing proof of due service thereof, and upon reading the affidavits of Charles B. Alling, sworn to the 26th day of October 1933 and of Marlon Doing, sworn to the 27th day of October 1933 and the said
58 motion having come on to be heard before this Court on the 27th day of October 1933 and due deliberation having been had, and upon filing the opinion of this court, and on motion of C. Arthur Metzer, Esq., attorney for petitioners, it is

Ordered that the President and Directors of The Manhattan Company, successor to The Bank of Manhattan Trust Company, as agent or depositary of the Northern Insurance Company of Moscow, be and they hereby are authorized and directed to release, transfer, and deliver all funds of the Northern Insurance Company of Moscow which the said President and Directors of The Manhattan Company have in their possession as agent or depositary of the Northern Insurance Company of Moscow, to the said President and Directors of The Manhattan Company, successor to The Bank of Manhattan Trust Company as assignee for the benefit of creditors of the Northern Insurance Company of Moscow.

Enter,

A. C., *J. S. C.*

59 *Exhibit "G", attached to affidavit of Robert J. Sykes*

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, in the County Court House, in the Borough of Manhattan, City of New York, on the 7th day of July 1934.

Present: Hon. Edward B. Dore, Justice.

IN THE MATTER OF THE ASSIGNMENT OF NORTHERN INSURANCE OF Moscow, Assignor, to The President and Director of the Manhattan Company, successor to the Bank of Manhattan Trust Company, Assignee, for the benefit of creditors

The assignee, for the benefit of creditors of the Northern Insurance Company of Moscow, having made and filed an account of this proceeding in the office of the Clerk of this Court on the 11th day of June 1934 and an order having been entered therein on
60 the 11th day of June 1934 requiring the creditors interested in this proceeding to show cause before this Court on the 19th day of June 1934 why an order should not be entered herein appointing a Referee to examine the account of the assignee and the claims filed by creditors with it and to examine the stipulation annexed to the account of the assignee which said stipulation provides for the payment and disposition of creditors' claims, and due notice having been given to all persons interested in said assigned estate to attend before this Court on said date pursuant to such order.

Now upon the account filed herein on the 11th day of June 1934 the schedule and papers thereto annexed, the proofs of claims duly filed with the Clerk of this Court and the order of this Court entered thereon on the 11th day of June 1934 and the petition of the assignee verified the 25th day of May 1934 and upon reading and filing notice of filing the account of the assignee and the admissions of service of the attorneys appearing herein and the notice of objections of Paul Riaboushinsky dated the 18th day of June 1934 and said motion having come on to be heard before this Court on the 19th day of June 1934 and having been thereupon submitted by the parties and due deliberation having been had thereon and upon filing the opinion of the Court it is on motion of Barker, Perrigo, and Bonynge, attorneys for the Assignee herein,

Ordered, that the matter be referrd to John Godfrey Saxe,
61 Esq., counselor at law, of No. 1 Cedar Street, New York City, to take and state the account of the assignee and to hear any and all objections made and filed herein, and any and all further objections that may be made and filed herein and report to this court with respect thereto; and it is further

Ordered, that the said Referee shall take proof and report as to all claims of creditors filed with the assignee as to their validity and proper amounts and shall examine the stipulation annexed to the

account of the assignee and report to this court thereon; and the said referee shall have power to subpoena and examine witnesses and the parties under oath in relation to their claim and all matters connected therewith; and it is further

Ordered, that the said Referee shall take proof and report as to the persons who are entitled to share in the disposition of said estate and in what priority and proportion; and it is further

Ordered, that the said Referee take proof as to the nature and amounts of the services performed for the assignee by its attorney, Barker, Perrigo & Bonynge, and report as to the reasonable compensation to be allowed for said services; and it is further

Ordered, that the Referee take proof and report as to the
62 necessary disbursements of the assignee and of the attorneys for the assignee; and it is further

Ordered, that the assignee, the attorneys for the assignee and the clerk of this court be and they hereby are directed to turn over to said Referee all files and papers in this proceeding for his use in connection with said reference; and it is further

Ordered, that the fiduciary settlement of the account of the Assignee be held in abeyance pending the coming in of the Referee's reports; and it is further

Ordered, that the said reference proceed at the office of said Referee, and that notice of a hearing before said Referee be served upon the attorneys appearing herein at least twenty (20) days before the date specified in said notice; and it is further

Ordered, that any party to this proceeding may apply at the foot of this order for such other and further relief as may be proper and equitable.

Enter,

E. D., *J. S. C.*

68 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit of Valentin Glasberg in opposition to complainant's motion for injunction

STATE OF NEW YORK,
County of New York, ss:

Valentin Glasberg, being duly sworn, deposes and says:

I reside in Paris, France. I am temporarily sojourning in the city of New York. I have read the affidavit of Edward J. Ennis, Assistant United States Attorney in and for the Southern District of New York, verified the 24th day of August 1934, upon the basis of which, together with an exhibit or exhibits which I will refer to, the Government is seeking an injunction to restrain the above named defendant from disbursing funds of the Northern Insurance Company of Moscow in its possession.

I was born in the Empire of Russia in the year 1901. I con-
64 tinuously resided in Russia from that date until 1920. I was educated in Petrograd, Russia, and I am entirely familiar with the Russian language. My knowledge and familiarity with such language is not only predicated upon my education in Russia but after my departure therefrom I have been associated with Russian nationals and officers and directors of Russian corporations in Paris for upwards of ten years.

During such association, I have repeatedly had occasion to examine and read documents in the Russian language. I have also, on hundreds of occasions, made translations therefrom which have been accepted by mercantile and banking corporations and firms as true and correct copies of translations from the Russian into the English.

My familiarity and knowledge of the English language is based upon my study of it in the schools I attended in Russia where I had special instruction for upwards of six years. After my departure from Russia I attended Oxford University in England where I spoke, read and wrote, and passed the examinations in the English language. I graduated from Oxford in 1923.

Since that time I have had occasion to read, write, and speak the English language repeatedly, not only in London, England, Paris, France, but also in the United States. I have also appeared in proceedings and actions pending in the Supreme Court of the State of New York, and have acted as an interpreter therein in the interpretation of Russian into English and English into Russian, and have been found acceptable to the attorneys for the various litigants therein.

I have examined with great care the decree in Russian which
65 is annexed to the affidavit of Mr. Ennis. I have also made a very careful examination of the English translation of this decree. I depose and say that there are two material errors contained in the translation. I will call them to the Court's attention in the order in which they appear.

In subdivision 3 of the decree, found on page 2 of the translation of the decree, it is stated as follows:

"(3) For the immediate organization of the insurance business and for the liquidation of insurance institutions which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established."

The words quoted omit to translate one word qualifying the statement, and which appears in the Russian text. The translation should read:

"(3) For the immediate organization of the insurance business and for the liquidation of *the parts of* the insurance institutions which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established."

The note in the same subdivision 3 reads in the translation:

"NOTE.—The same Commission is charged with the liquidating of private insurance organizations, all property and assets of
66 which, *disclosed at the time of their liquidation*, become the property of the Russian Socialist Federated Soviet Republic."

The italicized words do not accurately translate the Russian text. A proper and correct translation of the Russian text would be: "disclosed after their liquidation."

V. GLASBERG.

Sworn to before me this 12th day of September 1934.

ALVIN R. YOUNG,
Notary Public.

New York County Clerk's No. 10. New York County Register's No. 6Y19. King's County Clerk's No. 7. King's County Register's No. 6017. Commission expires March 30, 1936.

67 In United States District Court, Southern District of New York

[Title omitted.]

Answering affidavit of Valerian E. Greaves, in support of motion for injunction

STATE OF NEW YORK,
County of New York, ss.:

Valerian E. Greaves, being duly sworn, deposes and says:

1. I am a consultant on foreign law with an office at 2 Rector Street, Borough of Manhattan, City of New York.

2. I was born in the Empire of Russia in 1876 and I continuously resided there until June, 1918. I was graduated from the Imperial Law School of Russia with highest honors. Upon graduation I served two years as secretary to the Attorney General of Siberia and one year as secretary of a Committee appointed to liquidate penal deportation to Siberia. Subsequently, I joined the Bar
68 and practiced law as a notary of the Supreme Court at St. Petersburg from 1903 to 1918. I served as a member of a committee appointed to draft a new Civil Code for the Russian Empire (subsequently adopted by the Soviet Government as a basis of the Soviet Civil Codes). I served as a member of the Juridical Council of the Provisional (Kerensky) Government of Russia in 1917, which was a body consisting of nine members chosen from the Justices of the Supreme Court of Russia, professors and practicing attorneys, to advise the government on legal matters and on the constitutionality of its decrees.

3. Since 1921, I have been a consultant on foreign and international law in the City of New York. I have been continuously engaged in the study and advisory practice on matters of Soviet law. I am a member of the Committee on Foreign Law of the Bar Association of the City of New York and as such I have been specifically engaged in the examination of questions of Soviet law on which I have prepared several articles for the Bar Association. I am a member of a committee appointed by the Section of International and Comparative Law to report to the 1934 annual convention of the American Bar Association on the essential features to be included in the proposed commercial treaty of the United States with the Union of Soviet Socialist Republics and as a member of such committee have prepared several papers for the committee report. I acted as leader at a conference on Soviet Law at a meeting of the Section of International and Comparative Law at the American Bar Association.

69 4. In the course of my professional and scientific studies of Soviet Law, I have become familiar with the Soviet law concerning the nationalization of insurance and other private business enterprises and in my opinion I am able now to state the correct application of Soviet law to insurance enterprises.

5. I have examined a decree of the Council of People's Commissars "on the organization of insurance business in the Russian Republic", dated November 28, 1918, published in the "Izvestiya of the All-Russian Central Executive Committee of Soviets" (official newspaper), No. 263, on December 1, 1918, and subsequently republished in the Collection of Decrees and Orders concerning the National Economy, volume 2 pages 720, 721, a copy of which is attached to the affidavit of Edward J. Ennis in support of the order to show cause herein. The said decree is a duly enacted law of the Soviet Government and as such went into full force and effect on the date of its publication.

6. The said decree expressly proclaimed insurance in all its aspects and forms to be henceforth a State monopoly, and all private insurance companies and organizations, whether stock or mutual to be subject to immediate liquidation (with the exception of co-operative organizations engaged in mutual insurance of movable property and merchandise). The assets of all of the said private insurance companies and organizations were declared to be the property of the Soviet State by a special provision of the said decree proclaim-

70 ing that all assets of said private insurance companies outstanding upon liquidation became property of the Soviet State. It is my opinion, based on the express text of the said decree and my knowledge of the Soviet legal terminology that the said decree declared all assets of the private insurance organizations which were subject to liquidation to be the property of the Soviet State. The expression in the Russian text of the said decree "vse imustchestva", equivalent to the English expression "all properties", comprises all assets without exception regardless of what they

may consist and where they may be located, and extends to all tangible things outside of Soviet territory and choses in action including those against foreign debtors.

7. Neither the said decree, nor any other law, decree, instruction, interpretation or other enactment of the Soviet Government contains any provision indicating that the Soviet Government originally intended to exclude or subsequently excluded from the operation of the said decree any assets of private insurance concerns referred to in the said decree including assets outside of Soviet territory.

VALERIAN E. GREAVES.

Sworn to before me this 24th day of September 1934.

ARMAND CHANKALIAN,
Notary Public.

New York Co. Clerk's No. 367, Reg. No. 5C463. Commission expires March 30, 1936.

71 In United States District Court, Southern District of New York

(Title omitted.)

Answering affidavit of Edward J. Ennis, in support of motion for injunction

STATE OF NEW YORK,
County of New York, Southern District of New York, ss.:

Edward J. Ennis, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York in charge of the above entitled matter.

2. I have read the affidavit of Valentin Glasberg, verified the 12th day of September 1934, offered in opposition to the motion of the complainant for a temporary injunction herein in which it is stated that the translation of the decree of Russian State on the organization of the insurance business in the Russian
72 Republic annexed to my affidavit of August 24, 1934, in support of the order to show cause herein, is incorrect in two respects, in that paragraph 3 of the said translation omits to translate one word in the original text meaning "parts of", and in that the note in paragraph 3 incorrectly translates one word in the original decree to be "at the time of" instead of "after."

3. I have called this matter to the attention of the Department of State and I attach hereto a certified copy of the decree and of a corrected translation of said decree and a photostatic copy of a letter received therewith stating that the words "parts of" were inadvertently omitted in the typing of the certified translation previously transmitted, an exact and correct copy of which was annexed to my affidavit of August 24, 1934. The corrected transla-

tion does not alter the translation of "at the time of" in order to read "after."

EDWARD J. ENNIS.

Sworn to before me this 24 day of September 1934.

ARMAND CHANKALIAN,
Notary Public.

New York Co. Clerk's No. 367, Reg. No. 1C463. Commission expires March 30, 1935.

73 *Exhibit A attached to answering affidavit of Edward J. Ennis.*

Address Official Communications to
THE SECRETARY OF STATE
Washington, D. C.

DEPARTMENT OF STATE,
Washington, September 19, 1934.

In reply refer to
EE

MY DEAR MR. ATTORNEY GENERAL: Referring to my letter of August 20, 1934, transmitting a certified copy and translation of a decree of the Soviet of People's Commissars "on the organization of the insurance business in the Russian Republic", I am now enclosing additional copies of the same documents, namely, certified photostatic copies of the title page and of pages 720 and 721 of a Russian-language publication entitled "Collection of Decrees and Orders on National Economy (October 25, 1918–March 15, 1919) Volume two" published at Moscow in 1920 by the Supreme Soviet of National Economy of the Russian Socialist Federated Soviet Republic, a copy of which is in the possession of the Department of State, and a certified translation made by Mr. I. Jawney, a translator in the employ of the Department of State, of those portions of pages 720 and 721 which contain thte text of the above-mentioned decree.

74 The Honorable HOMER S. CUMMINGS,
Attorney General.

In this connection, I wish to invite your attention to the fact that the words "parts of", which appeared between the words "of" and "insurance" in line two, page two, in the draft translation, were inadvertently omitted in the typing of the certified translation, as previously transmitted. These words have been inserted in their proper place in the text of the certified translation enclosed herewith.

Sincerely yours,

R. WALTON MOORE,
Assistant Secretary.

Enclosures:
Certified photostatic sheets;
Certified translation.

75 *Exhibit B—Certified copy of Russian text of a decree of the Russian State on the organization of the insurance business in the Russian Republic attached to answering affidavit*

Certified Translation of Exhibit B, Attached to Answering Affidavit

Source: Collection of decrees and orders on national economy (October 25, 1918—March 15, 1919) volume two. Published by the Supreme Soviet of National Economy of the Russian Socialist Federated Soviet Republic, Moscow, 1920. Pages 720, 721.

Decree of the Soviet of People's Commissars 603. On the organization of the insurance business in the Russian Republic.

(1) Insurance in all its forms, such as fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, livestock insurance, insurance against failure of crops, etc., is hereby proclaimed as a State monopoly.

NOTE.—Mutual insurance of movable goods and merchandise by the cooperative organizations is conducted on a special basis.

(2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree
76 are subject to liquidation; former rural * (People's Soviet) and municipal mutual insurance organizations operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Soviet Republic.

(3) For the immediate organization of the insurance business and for the liquidation of parts of insurance institutions, which have become the property of the Russian Socialist Federated Soviet Republic, a commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Preventional, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

NOTE.—The same commission is charged with the liquidating of private insurance organizations, all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Federated Soviet Republic.

(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished not later than the first day of April 1919.

(5) The Commissariat of Insurance and Fire Prevention,
77 together with all its institutions, is reorganized into the Insurance Department of the Supreme Soviet of National Economy. The matter of fire prevention is transferred to the Supreme Soviet of National Economy.

* zemskie.

(6) No Soviet properties and enterprises are subject to insurance.

(7) Life insurance with the State Savings Banks is conducted upon the former basis.

(8) The present decree comes into force on the day of its publication.

(Signed) Chairman of the Soviet of People's Commissars
V. ULYANOV (Lenin).
Administrator of Affairs of the Soviet of People's Commissars
V. BONCH-BRUEVICH.

("IZVESTIYA of the All-Russian Central Executive Committee of Soviets", December 1, 1918, No. 263)

[Translator's Note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

Ignatius, Jawney,
IGNATIUS JAWNEY,
Principal Translator,
Department of State.

Appointed Translator, January 1928.
Russian.
Tr. IJ:MW:SS

78 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit of William G. Welliaminoff in opposition to complainant's motion for injunction

STATE OF NEW YORK,
County of New York, ss:

William G. Welliaminoff, being duly sworn, deposes and says:

I was born in Moscow, Russia, in the year 1899 and I continuously resided in Russia until October 1918. I was educated in Moscow, Russia, and I am a graduate of a high school and college in Moscow and of the Law School of the Imperial University of Moscow.

I am entirely familiar with the Russian language. Since 1918, the time when I left Russia, I had occasion to constantly use the Russian language. I came to the United States in 1923 and become an American citizen in 1928. Since 1923 I have been a per-
79 manent resident of the City of New York. In 1927 I enlisted as a student in the New York University Law School (Washington Square Branch) and graduated from said school in 1930.

For the last ten years in New York I have repeatedly had occasion to examine and read documents in the Russian language. I have also on numerous occasions made translations of various Rus-

sian documents, decrees, laws, and decisions of Russian Courts which have been accepted by numerous law firms in New York City and used by them at various trials. I have also on numerous occasions interpreted in court and before Referees the testimony given by expert witnesses on the Russian law.

My familiarity and knowledge of the English language is based upon my study of it in the schools I attended in Russia and upon my constant use of said language for the last ten years:

At the request of Mr. Sykes of Rumsey & Barker, 52 Wall Street, New York City, I have carefully examined the Russian text of the Decree of the Soviet of People's Commissars published on December 1, 1918, "on the organization of the insurance business in the Russian Empire" and the translation of said Decree attached to the affidavit of Edward J. Ennis, Assistant United States Attorney in and for the Southern District of New York verified the 24th day of August 1934, which was given to me by said Mr. Sykes. I so examined the Russian text of said Decree in the New York Public Library on 42nd Street and Fifth Avenue, where I found a complete original collection of the Soviet Decrees published in the
80 "Collection of Enactments and Decrees of the Workers' and Peasants' Government."

I depose and say that I find two material errors contained in the translation of the Decree of December 1, 1918, attached to the affidavit of Mr. Ennis.

In Subsection 3 of the Decree (page 2 of the translation) it is stated as follows:

"For the immediate organization of the insurance business and for the liquidation of insurance institutions which have become the property of the Russian Socialistic Federated Soviet Republic a commission is established."

The words quoted omit to translate one word qualifying the statement which appears in the Russian text, namely, the words "the parts of the" which should be inserted after the word "of" and before the word "insurance" in the second line of the translation as it appears above. The first sentence of an accurate and true translation of Subsection 3 should read:

"For the purpose of immediate organization of the insurance business and for the liquidation of *the parts of the insurance* institutions which have become the property of the Russian Socialistic Federated Soviet Republic a commission is established."

The note to the same Subsection 3 reads in the translation annexed to the affidavit of Mr. Ennis as follows:

81 "The same commission is charged with the liquidation of private insurance organizations and all property and assets *disclosed at the time of their liquidation* became the property of the Russian Socialistic Federated Soviet Republic."

The italicized words do not repfesent an accurate translation of the Russian text. A proper and correct translation of the Russian text should read as follows:

"Said committee shall also be charged with the liquidation of private insurance organizations; their entire property *which shall remain after their liquidation*, shall become the property of the Russian Socialistic Federated Soviet Republic."

WILLIAM G. WELLIAMINOFF.

Sworn to before me this 2nd day of October, 1934.

ALVIN R. YOUNG,
Notary Public.

New York County Clerk's No. 10. New York County Register's No. 6Y19. Kings County Clerk's No. 7. Kings Co. Register's No. 6017. Commission expires March 30, 1936.

82 In United States District Court, Southern District of New York

[Title omitted.]

Second affidavit of William G. Welliaminoff, in opposition to complainant's motion for injunction

STATE OF NEW YORK,
County of New York, ss.:

William G. Welliaminoff, being duly sworn, deposes and says:

I was born in Moscow, Russia, in the year 1899 and I continuously resided in Russia until October, 1918. I was educated in Moscow, Russia, and I am a graduate of a high school and college in Moscow and of the Law School of the Imperial University of Moscow.

I am entirely familiar with the Russian language. Since 1918, the time when I left Russia, I had occasion to constantly use the Russian language. I came to the United States in 1923 and became an
83 American citizen in 1928. Since 1923 I have been a permanent resident of the City of New York. In 1927 I enlisted as a student in the New York University Law School (Washington Square Branch) and graduated from said school in 1930.

For the last ten years in New York I have repeatedly had occasion to examine and read documents in the Russian language. I have also on numerous occasions made translations of various Russian documents, decrees, laws, and decisions of Russian courts which have been accepted by numerous law firms in New York City and used by them at various trials. I have also on numerous occasions interpreted in court and before Referees the testimony given by expert witnesses on the Russian law.

My familiarity and knowledge of the English language is based upon my study of it in the schools I attended in Russia and upon my constant use of said language for the last ten years.

At the request of Mr. Sykes of Rumsey & Barker, 52 Wall Street, New York City, I have carefully examined the Russian text of circular of the Commissariat of Justice No. 194 dated September 26, 1923, published in the Messenger of Soviet Justice No. 38 for the year 1923. I have so examined said text in the New York Public

Library on 42nd Street and Fifth Avenue, where I found on file a copy of the original publication above referred to.

I have also examined a translation of said circular submitted to me by said Mr. Sykes.

A copy of said translation, together with a photostat copy
84 of the original Russian text, is hereto attached. (The photostatic copy of the Russian text was at my request prepared by the Photostatic Division of the New York Library.)

I find that the English translation hereto attached of the circular above referred to is a true, accurate, and correct translation of the Russian original.

WILLIAM G. WELLIAMINOFF.

Sworn to before me this 2nd day of October 1934.

WM. H. BRUDER,
Notary Public.

Bronx County No. 137. Certificate filed in New York County No. 467. Bronx County Register's No. 88B35. New York County Register's No. 55272. Commission expires March 30, 1935.

85 *Exhibit A—Russian text of Circular of Commissariat of Justice No. 194, dated September 26, 1923, attached to affidavit of Welliaminoff in opposition.*

Translation of Exhibit A

Circular of the Commissariat for Justice. No. 194 Dated 26th September, 1923. (Published in Messenger of Soviet Justice 1923 No. 38.)

TO ALL THE DEPARTMENTAL TRIBUNALS (Notaries' Section):

On the inadmissibility to refuse to execute and certify agreements, assignments, and other instruments concerning the assignment of proprietary rights abroad.

In view of the doubt which arises on the spot (throughout the country) on the question of the right of free disposal of documents proving rights to proprietary rights belonging to citizens of the R. S. F. S. R. outside the R. S. F. S. R. and in particular to all policies issued by foreign insurance companies, the People's Commissariat for Justice states:

Proprietary rights of citizens of the R. S. F. S. R. enforcible outside the R. S. F. S. R. are governed by the laws of the country
86 where they are to be enforced; to prevent the free disposal of such rights would result in an unlawful enrichment of the foreign debtors and individuals under obligations and in a loss to Russian citizens.

Consequently, Russian citizens have the entire and free disposal of such rights and in particular the right to assign them in any manner recognized by the Civil Code of the R. S. F. S. R. both to

citizens of the R. S. F. S. R. or to foreigners, inasmuch as such assignment is not forbidden by some special decree

In accordance with what has just been set out the Notaries' Offices must not refuse to execute and certify agreements, assignments, and other instruments concerning the assignment of proprietary rights abroad among other policies of foreign insurance companies.

People's Commissar for Justice

KRILENKO

Member of the Board of the People's Commissariat for Justice

BRANDENBURGSKY

26th September, 1923.

87 In United States District Court, Southern District of New York

[Title omitted.]

Third affidavit of William G. Welliaminoff, in opposition to complainant's motion for injunction

STATE OF NEW YORK,
County of New York, ss:

William G. Welliaminoff, being duly sworn, deposes and says:

I was born in Moscow, Russia, in the year 1899 and I continuously resided in Russia until October 1918. I was educated in Moscow, Russia, and I am a graduate of a high school and college in Moscow and of the Law School of the Imperial University of Moscow.

I am entirely familiar with the Russian language. Since 1918, the time when I left Russia, I had occasion to constantly use the Russian language. I came to the United States in 1923 and
88 became an American citizen in 1928. Since 1923 I have been a permanent resident of the City of New York. In 1917 I enlisted as a student in the New York University Law School (Washington Square Branch) and graduated from said school in 1930.

For the last ten years in New York I have repeatedly had occasion to examine and read documents in the Russian language. I have also on numerous occasions made translations of various Russian documents, decrees, laws, and decision of Russian Courts which have been accepted by numerous law firms in New York City and used by them at various trials. I have also on numerous occasions interpreted in court and before referees the testimony given by expert witnesses on the Russian law.

My familiarity and knowledge of the English language is based upon my study of it in the schools I attended in Russia and upon my constant use of said language for the last ten years.

At the request of Mr. Sykes of Rumsey & Barker, 52 Wall Street, New York City, I have carefully examined the Russian text of circular of the People's Commissariat for Foreign Affairs addressed to the Plenipotentiary Representatives of the R. S. F. S. R. abroad bearing number 42 and dated April 12, 1922, published in the Messenger of the People's Commissariat for Foreign Affairs No. 6 for the year 1922. I have so examined said text in the New York Public Library on 42nd Street and Fifth Avenue, where I found on file a copy of the original publication above referred to.

89 I have also examined a translation of said circular submitted to me by said Mr. Sykes.

A copy of said translation, together with a photostat copy of the original Russian text is hereto attached. (The photostatic copy of the Russian text was at my request prepared by the Photostatic Division of the New York Public Library.)

I find that the English translation hereto attached of the circular above referred to is a true, accurate, and correct translation of the Russian original.

WILLIAM G. WELLIAMINOFF.

Sworn to before me this 2nd day of October, 1934.

WM. H. DRUDER,
Notary Public.

Bronx County No. 137. Certificate filed in New York County No. 467. Bronx County Register's No. 88835. New York County Register's No. 5B272. Commission expires March 30, 1935.

90 *Exhibit A—Russian text of Circular of People's Commissariat for Foreign Affairs No. 42, dated April 12, 1922, attached to affidavit of William G. Welliaminoff.*

Translation of Exhibit A

Circular of the People's Commissariat for Foreign Affairs to the Plenipotentiary Representatives of the R. S. F. S. R. abroad, No. 42, dated 12th, April, 1922 (See: "Messenger of the People's Commissariat for Foreign Affairs", 1922, No. 6).

In the practice of the foreign agencies of the People's Commissariat for Foreign Affairs there arises the question of whether such organs are entitled to assume the protection of Russian citizens in the exercise by them of such proprietary rights as belong to them by virtue of the Law of the country wherein they reside which, on the basis of the Law in force in R. S. F. S. R., would not be recognized here, such as, for instance, the right to own real estate.

The People's Commissariat for Foreign Affairs explains that the Law of each country establishing some definite system of Law of Property is valid only within the territorial limits of that country, but that within the boundaries of such territory such Law applies to legal relations pertaining to property irrespective of the na-

tionality of the persons who may be entitled to such rights. The Law on Property established by the decrees of the Russian Soviet Government does, therefore, determine only such legal rela-
91 tions pertaining to property rights as arise on the territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject-matter is situated outside the territory of the R. S. F. S. R. and is not connected with such territory cannot be governed outside the territory of the R. S. F. S. R. by Russian Law and are—irrespective of the nationality of the persons entitled to such rights, be they even Russian Citizens—subject to the effects of local Law.

Thus, when a certain legal concept is generally recognized by the local law, the fact that our own law does not recognize the same cannot, of itself, prevent our plenipotentiary representatives and consulates from protecting such rights as a matter of general protection of the lawful interests of Russian citizens.

Such is the general rule. However, the extent of protection of such rights is limited by the general principles and legal concepts of the Soviet State. Claims and actions, though they may be lawful according to the Laws of the country where one resides, may be directly opposed to the ideas prevailing in the R. S. F. S. R. as to the extent to which such rights may be enforced; such claims and actions should not be furthered by the Soviet representatives. Such instances shall be separately examined in each individual case.

Please acknowledge receipt of the present circular.

Acting People's Commissar
KARAKHAN.

Acting Director of the Economic and Legal Department,
ZALKIND.

92 In United States District Court, Southern District of New York

E. 78-377

UNITED STATES OF AMERICA, COMPLAINANT

AGAINST

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT

E. 78-383

UNITED STATES OF AMERICA, COMPLAINANT

AGAINST

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSOR to The Bank of Manhattan Trust Company, defendant

Appearances

Martin Conboy, U. S. Attorney, Solicitor for the Plaintiff in both cases (Martin Conboy, Francis H. Horan, Edward J. Ennis, and Paul A. Sweeney, Esqs., of Counsel).

Messrs. Emmet, Marvin & Martin, Solicitors for Defendant Bank of New York and Trust Company (Frederick B. Campbell, Paul C. Whipp, and Lounsbury D. Bates, Esqs., of Counsel).

93 Messrs. Rumsey & Barker, Solicitors for Defendant President and Directors of The Manhattan Company (Wendell P. Barker, Robert J. Syykes and W. C. Morris, Esqs., of Counsel).

Messrs. Charles B. Alling, Hartwell Cabell, Coudert Brothers, John M. Downes, Engelhard, Pollak, Pitcher, Stern & Clarke, Borris M. Komar, Rosenberg, Goldmark & Colin and Samson Selig, representing various interests, filed briefs *amici curiae* in opposition to the motions of the Government and in support of the motions of the defendants to dismiss.

Opinion filed Nov. 30, 1934

COXE, *D. J.*:

In these suits the United States seeks to establish title to the remaining New York assets of Moscow Fire Insurance Company and Northern Insurance Company, two Russian insurance corporations which were dissolved in 1918 by decrees of the Soviet Government. These Companies formerly maintained branches in this country, and upwards of eight years ago the New York assets of both companies were taken over by the New York Superintendent of Insurance in liquidation proceedings under the New York statute.

The Superintendent's liquidation was completed prior to 1933, and in that year the remaining assets of the Moscow Company were turned over, under a State court order, to the defendant Bank of New York and Trust Company "as agent or depositary" of the Moscow Company, subject to withdrawal only on the "order

94 of a Court of competent jurisdiction." The same disposition was made of the remaining assets of the Northern Company, except that the depositary in that case was the Bank of Manhattan Trust Company, predecessor of the defendant President and Directors of The Manhattan Company.

The Northern Company had previously made an assignment for the benefit of creditors to the defendant President and Directors of The Manhattan Company, under the New York statute, and, by a later order of the State court, the transfer of the assets of the Northern Company to that Company, as assignee, was authorized and approved.

The funds of the two companies are now held by the defendant Banks, awaiting distribution among the persons entitled to share in the funds, respectively.

Recently, proceedings were started in the State courts, on notice to all parties interested, to secure distribution of the two funds, and these proceedings have proceeded in the case of the Moscow Company to judgment, and, in the case of the Northern Company, to a consideration of the claims presented.

The complaints in the two suits are substantially alike, and allege that the funds of the two Companies, now held by the defendant

Banks, were "confiscated and appropriated" by the "Russian State" in 1918, and that title to both funds was assigned to the United States by the "Russian State" on November 16, 1933. The prayer for relief in each case is for an accounting and a direction to turn over the fund to the United States.

95 The present motions are by the Government in each case for an injunction pendente lite, restraining distribution of the fund; and by the defendant in each case for a dismissal of the complaint for insufficiency.

The principal contentions urged by the defendants in support of the motions to dismiss are (1) that our courts will not enforce the Soviet decrees of confiscation over property located here, and which has always been located here; and (2) that no title or interest in or to the funds of the two Companies now held by the defendant Banks has been or could be assigned or transferred to the United States by the Soviet Government.

The legislation of any nation has no extraterritorial force as a matter of right. Rose v. Himely, 4 Cranch, 241; The Apollon, 9 Wheat. 362; Hilton v. Guyot, 159 U. S. 113; Second Russian Ins. Co. v. Miller, 297 Fed. 404, affd. 268 U. S. 552. The extent to which such legislation will be recognized by other nations depends on comity. The Bank of Augusta v. Earle, 13 Peters, 519, 589; Second Russian Ins. Co. v. Miller (supra). Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U. S. 113, 164.

The courts of this country will not, however, enforce the laws of foreign nations which are contrary to our own public policy;

96 The Bank of Augusta v. Earle (supra); Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149; Vladikavkazsky Ry. Co. v. N. Y. Trust, 263 N. Y. 369; and the public policy of the United States is to be determined "from the Constitution and the laws, and the course of administration and decision"; License Tax Cases, 5 Wall 462, 469; "not by the varying opinions of laymen, lawyers, "or judges as to the demands of the interests of the public." Hartford Fire Ins. Co. v. Chicago, 70 Fed. 201, 202.

The confiscatory decrees of the Soviet Government were clearly opposed to the public policy of the United States. Russian Volunteer Fleet v. U. S., 282 U. S. 481, 491, 492; Petrogradsky M. K. Bank Co. v. National City Bank, 253 N. Y. 23; Vladikavkazsky Ry. Co. v. N. Y. Trust, 263 N. Y. 369; Baglin v. Cusenier, 221 U. S. 580. They were utterly ineffective to reach the properties of the Moscow and Northern Companies in this country; Vladikavkazsky Ry. Co. v. N. Y. Trust (supra); Baglin v. Cusenier (supra); The Jupiter, 96 L. I. P. 62 (1927); Employees Liability v. Sedgwick, 1927, A. C. 95; and the subsequent recognition of the Soviet Government in no

way changed the confiscatory nature of the decrees in so far as these particular funds were concerned. Lehigh Valley v. State of Russia; 21 Fed. (2) 396, 401; Vladikavkazsky Ry. Co. v. N. Y. Trust (supra).

It is insisted on behalf of the United States that the Soviet Government became the "liquidator" of the assets of the two dissolved Russian insurance companies, and that a liquidator's title
97 will be accorded recognition in our courts. The difficulty with this contention is that the complaints allege specifically that the properties of the two companies were "confiscated and appropriated" by the Soviet Government. However, it is perfectly clear that the liquidation of a corporation implies winding up and distribution of the assets among the creditors and stockholders; Lafayette Trust Co. v. Beggs, 213 N. Y. 280, 283; Matter of Silkman, 121 A. D. 202; and it is nowhere suggested that the two funds in question were assigned to the United States for any such limited purpose as counsel intimates.

I am satisfied, also, that no assignment or transfer of the two funds was ever made to the United States by the Soviet Government. The instrument relied on to support the alleged assignment is the letter of Mr. Litvinoff, People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, to the President of the United States, dated Nov. 16, 1933, reading as follows:

"MY DEAR MR. PRESIDENT":

"Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist
98 Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment."

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interest therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States or public officials in the United States, or
99 its nationals relating to property, credits or obligations of any Government of Russia or nationals thereof."

"I am, my dear Mr. President,
Very sincerely yours,

MAXIM LITVINOFF,
People's Commisar for Foreign Affairs,
Union of Soviet Socialist Republics.

"Mr. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House."

Under the express terms of this letter, the assignment to the United States was of "the amounts admitted to be due or that may be found due it (i. e. the Soviet Government) as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, * * *."

The funds held by the defendant banks for the Moscow and Northern Companies were in no sense due the Soviet Government from "American nationals." They belonged to the two dissolved insurance companies, which were given juristic standing in the New York courts by repeated decisions of the Court of Appeals. Petrogradsky M. K. Bank v. National City Bank, 253 N. Y. 23; Matter of People (Russian Reinsurance Co.), 255 N. Y. 415; Matter of People (Northern Ins. Co.), 255 N. Y. 433. Moreover, the defendant banks were merely custodians of the respective funds,
100 pursuant to orders of the State courts; and now the defendant Bank of New York and Trust Company holds the fund of the Moscow Company only "as agent or depositary" of that company; and in the case of the Northern Company the defendant president and directors of the Manhattan Company is acting as assignee for the benefit of creditors under the New York statute. With respect to neither fund is there any relation of debtor and creditor insofar as the defendant banks are concerned. The letter plainly refers only to such funds as were involved in State of Russia v. National City Bank, 69 Fed. (2) 44, where an American bank was the debtor of the Russian Government for the latter's funds held on deposit; it has no application whatever to the present funds now in the hands of the defendant banks merely as custodians. This is particularly emphasized by the inclusion in the letter of the claim of the Russian Volunteer Fleet, which was before the Supreme Court in Russian Volunteer Fleet v. U. S., 282 U. S. 481; for if it had been intended to transfer to the United States claims against dissolved Russian insurance companies for the recovery of New York assets, concerning which there had at the time been extensive litigation in the New York courts, it is at least reasonable to suppose that specific reference would have been made to them.

The suggestion of the Government that the Litvinoff assignment is not open to judicial construction requires little comment, for clearly where private rights are concerned, the mere assertion of the Government that suits should be commenced does not pre-
101 clude the courts from determining as a judicial matter the true meaning of the instrument involved. There is nothing in State of Russia v. National City Bank, 69 Fed. (2) 44, holding to the contrary; and the statement on page 48 of the opinion that "Our courts must accept the assertion of the government of the United States as to the effect of an assignment", when applied to the particular facts of the case, mean nothing more than that the authority of Mr. Litvinoff to make the assignment, and the right of the United States to accept it, will not be questioned by our courts. The word "effect" as used in this excerpt from the opinion, was not intended to preclude judicial interpretation of the language of the instrument itself.

I hold, therefore, that the two funds in the hands of the defendant Banks were not in any way affected by the Soviet decrees of confiscation, and that the United States has not acquired title to either fund; and with this disposition of the principal issues in the two cases, it seems unnecessary to consider the other points raised by counsel.

The motion of the defendant in each case to dismiss the complaint for insufficiency is granted; and the motions of the United States for injunctions pendente lite are denied. November 28, 1934.

ALFRED C. COXE,
United States District Judge.

102 In United States District Court, Southern New York

Present: Honorable Alfred C. Coxe, United States District Judge.

In Equity. No. 78-383

UNITED STATES OF AMERICA, COMPLAINANT,

AGAINST

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSOR to The Bank of Manhattan Trust Company, Defendant.

Order and Decree, Dec. 20, 1934

The complainant, on August 25, 1934, having filed its bill of complaint herein, verified August 24, 1934, and complainant having moved, by order to show cause dated August 25, 1934, upon the aforesaid bill of complaint, and upon the affidavit of Edward J. Ennis, verified August 24, 1934, and the papers thereto attached, for an injunction pendente lite restraining the defendant from distrib-

uting any part of the funds alleged in the bill of complaint to be in the possession of the defendant; and complainant in support of its motion for an injunction pendente lite having filed and
103 served affidavits of Valerian E. Greaves and Edward J. Ennis, both verified September 24, 1934, and the documents thereto annexed; and defendant, in opposition to complainant's motion for an injunction pendente lite having filed with the Court the following enumerated documents, namely, affidavit of Andrew Wilson, verified August 31, 1934; the affidavit of Robert J. Sykes, verified September 12, 1934, and Exhibits "A" to "G" inclusive thereto attached; the affidavit of Valentin Glasberg, verified September 12, 1934; the three affidavits of William G. Welliaminoff, all verified October 2, 1934, and the documents thereto attached;

And the cause having come on to be heard on the 4th and 6th days of October, 1934;

And the defendant having orally moved for an order dismissing the bill of complaint on the ground that said complaint fails to state facts sufficient to constitute a cause of action;

Now, upon reading the papers filed herein as above recited, and after hearing Martin Conboy, Esq., United States District Attorney for the Southern District of New York, on behalf of the complainant, United States of America, in support of the bill of complaint and of the motion for an injunction pendente lite; and Wendell P. Barker and Robert J. Sykes, Esqs., on behalf of the defendant, in support of the motion to dismiss the bill of complaint and in opposition to complainant's motion for an injunction pendente lite; and due deliberation having been had, and the Court on November 30, 1934, having rendered and filed its opinion dated November 28, 1934;

104 And upon the motion of Rumsey & Barker, solicitors for the defendant, it is

Ordered, adjudged, and decreed that the defendant's motion to dismiss the bill of complaint for insufficiency be and hereby is granted, and the motion of the complainant for an injunction pendente lite be and hereby is denied, and that the bill of complaint be and hereby is dismissed.

And, complainant having applied for a suspension, pending appeal, of the order and decree, and defendant having consented to such suspension upon the terms hereinafter specified, it is further

Ordered that the operation of this order and decree be and is hereby suspended until the coming down and the filing in this Court of the mandate of the United States Circuit Court of Appeals upon an appeal by complainant to such court, upon the conditions hereinafter specified, namely:

(a) that the petition and allowance of appeal, the assignment of errors and the citation be filed and served within two (2) days from the date hereof;

(b) that the printed transcript of the record shall be made, filed, and served by the complainant within ten (10) days from the date hereof.

(c) that complainant will apply to the United States Circuit Court of Appeals for the hearing of such appeal upon a date as
105 near the commencement of the January 1935 Term (January 7, 1935) of said Court as may be possible; and

(d) that complainant's brief on appeal will be served upon defendant's solicitors ten (10) days prior to the date so set for argument of such appeal.

ALFRED C. COXE, *U. S. D. J.*

Filed 12/20/34.

In United States District Court, Southern District of New York

[Title omitted.]

Petition and allowance of appeal

The complainant, United States of America, by Martin Conboy, United States Attorney for the Southern District of New York, considering itself aggrieved by the order and decree in the above-entitled cause, dated December 20, 1934, and filed December
106 20, 1934, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors filed herewith and prays that this appeal be allowed, that a citation be issued, directed to the above named defendant commanding it to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may be just in the premises, and that a transcript of the record, proceedings, and papers upon which the said decree and order were made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit.

MARTIN CONBOY,
United States Attorney for the
Southern District of New York,
Solicitor for Complainant,

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Ordered that the appeal prayed for by the complainant, United States of America, be and hereby is allowed.

Dated, New York, N. Y., December 22nd, 1934.

ALFRED C. COXE, *U. S. D. J.*

107 In United States District Court, Southern District of New York

[Title omitted.]

Assignment of errors

Now comes the complainant, United States of America, and files the following assignment of errors upon which it will rely on its appeal from the order and decree in the above entitled cause made and entered on December 20, 1934:

1. The Court erred in granting the motion of the defendant to dismiss the bill of complaint for failure to state facts sufficient to constitute a cause of action.

2. The Court erred in granting the motion of the defendant to dismiss the bill of complaint for insufficiency.

3. The Court erred in denying the motion of the complainant for an injunction pendente lite.

4. The Court erred in holding that the assignment from the
108 Union of Soviet Socialist Republics to the complainant, dated November 16, 1933, did not transfer to the complainant all of the right, title and interest of the Northern Insurance Company of Moscow and all the right, title and interest of all of its stockholders in all of the property of the Northern Insurance Company of Moscow in the United States, including the cash, securities and other assets held by the defendant.

5. The Court erred in holding that the decree of the Russian State nationalizing the Northern Insurance Company of Moscow and appropriating all of its property in the United States, including the cash, securities and other assets held by the defendant, are opposed to the public policy of the United States.

6. The Court erred in holding that the decrees of the Russian State nationalizing the Northern Insurance Company of Moscow were ineffectual to reach the properties of the Northern Insurance Company of Moscow in the United States.

7. The Court erred in holding that recognition of the Soviet Government by the United States did not change the confiscatory nature of the decrees of the Russian State nationalizing the Northern Insurance Company of Moscow and appropriating all of its property in the United States including the cash, securities and other assets held by the defendant.

8. The Court erred in holding that the decrees of the Rus-
109 sian State did not appropriate and transfer to the Russian State all of the right, title and interest of the Northern Insurance Company of Moscow and all of the right, title and interest of all of its stockholders in all of the property of the Northern Insurance Company of Moscow in the United States including the cash, securities and other assets held by the defendant.

9. The Court erred in holding that by the decrees of the Russian State the said Russian State did not become the liquidator of all of the assets of the Northern Insurance Company of Moscow, including the cash, securities, and other assets held by the defendant.

Wherefore, complainant prays that the said order and decree, made and entered December 20, 1934, be reversed and that the said

Court may be directed to grant the complainant's motion for an injunction pendente lite as prayed for in the bill of complaint.

Dated, New York, N. Y., December 22, 1934.

MARTIN CONBOY,
United States Attorney for the
Southern District of New York,
Solicitor for Complainant.

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

110 [Citation in usual form omitted in printing.]

111 In United States District Court, Southern District of New York

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, January 18, 1935.

MARTIN CONBOY,
U. S. Attorney,
Attorney for Complainant-Appellant.

WENDELL P. BARKER,
Attorney for Defendant-Appellee.

112 [Clerk's certificate to foregoing transcript omitted in printing.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSORS to Manhattan Bank Trust Company, defendant-appellee

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges

In equity. Appeal from a decree of the District Court for the Southern District of New York dismissing the bill of complaint. Affirmed.

Martin Conboy, United States attorney for complainant-appellant; Francis H. Horan, Edward J. Ennis, assistant United States attorneys.

Sherman & Sterling, solicitors for the National City Bank of New York; Joseph M. Proskauer, Philip A. Carroll, Otey McClellan, J. Alvin Van Bergh, of counsel.

Wendell P. Barker, solicitor for the defendant president and directors of The Manhattan Company; Wendell P. Barker, Robert J. Sykes, William C. Morris, of counsel.

Graham, McMahon, Buell & Knox, amicus curiae pro se and in behalf of creditors of the Northern Insurance Company of Moscow; Edward Ward McMahon, William H. Hall, of counsel.

PER CURIAM.

Affirmed on the authority of *United States* v. *Bank of New York and Trust Company* handed down herewith.

United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSORS to the Bank of Manhattan Trust Company, defendant-appellee

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1817, defendant-appellee.

MANTON, Circuit Judge, dissenting.

The complaints in these actions ask for accountings seeking to recover balances held by Russian insurance corporations, Moscow Fire Insurance Company of Moscow, Russia; The First Russian Insurance Company, and Northern Insurance Company of Moscow, Russia, held by the respective banks, appellees, as depositories. Each insurance company had its principal offices in Russia.

In Bank of New York and Trust Company case, the complaint alleges that in 1917 and 1920 decrees of the Russian State dissolved the Moscow Fire Insurance Company, that all of its right, title, and interest and all the right, title, and interest of the stockholders in its property, including deposits made with the Superintendent of Insurance of the State of New York, was confiscated and appropriated by the Russian State. It alleges that, on April 18, 1933, the claims of domestic creditors to the fund deposited with the Superintendent of Insurance of New York had been satisfied and that he, pursuant to an order of the Supreme Court of New York, directed that the fund be released and paid, and the balance transferred and delivered to the agent or depository of the Moscow Insurance Company, not to be withdrawn except upon an order of a court of competent jurisdiction; that the appellee received and had cash securities amounting to $1,180,399.54. It set forth an assignment on November 16, 1933, by the Russian State to the appellant for valuable consideration, of all the right, title, and interest in and to the cash and securities constituting the balance of the deposit and also that the appellant by assignment had all the right, title, and interest of all Russian nationals in and to this cash and securities, and that it was the sole and exclusive owner entitled to immediate possession. It alleges a demand of and refusal by appellee to deliver this property to appellant and the wrongful withholding thereof.

In the *Van Schaick* case, the complaint pleaded that the First Russian Insurance Company had been dissolved by decree of the Russian State and its property, including its deposit with this superintendent of insurance of New York had been confiscated and appropriated by the Russian State. It alleges that on August 8, 1925, by order of the New York State Supreme Court, the superintendent of insurance took possession of the property of the domestic United States branch of that insurance company (established 1907) under section 63 of the insurance law of the State. That all domestic claims had been adjudicated and allowed, leaving undisposed of certain foreign claims which arose in the conduct of the business

outside of the United States; that two claimants residing in the city of New York had been allowed $128,010.58 and $38,403.17 each, respectively, by an order of the State supreme court on February 26, 1934. That on appeal to the appellate division of the supreme court of the State, this award was affirmed (June 15, 1934) but that an appeal was taken to the Court of Appeals of the State of New York and is undisposed of. An assignment of the balance of $1,170,783.36, as of November 16, 1933, is pleaded.

In the case of president and directors of the Manhattan Company, it is pleaded that the Northern Insurance Company of Moscow is a Russian corporation with a branch in New York, and that it made a deposit with the superintendent of insurance of New York to comply with the requirements of the insurance law. That it too had been dissolved back in 1917 and 1918, and its property confiscated by the Russian State. That the superintendent of insurance took possession August 3, 1933; the claims of domestic creditors as to this fund, deposited with the superintendent of insurance, were satisfied pursuant to an order of the State supreme court and directed that the funds be released, paid and transferred to the agent or depository of the Northern Insurance Company of Moscow, said funds to be withdrawn upon order of a court of competent jurisdiction. The amount here involved was $332,994.15 held by the appellee. It is alleged that this too was assigned on November 16, 1933. Demands were made for the payment of these moneys pursuant to this assignment and refused.

In each case a restraining order against disposition pending the trial of a suit was denied and on motion supported by affidavits, each of the complaints was dismissed.

The United States claims title to these balances and asks for an accounting by virtue of two assignments executed by agents of the Russian Government—the Ughet and Litvinov assignments, the first executed prior to and the second since recognition. The questions presented are: (1) does the claim of the Government to the balance named in the hands of the appellees come within the terms of the so-called "Litvinov assignment"; and (2) assuming it does, what is the effect of a political recognition of the Union of Soviet Socialist Republics, and should such recognition be retroactive and extraterritorial in its effect?

As to the first question: on the 16th of November 1933, Litvinov, the People's Commisar for Foreign Affairs of the Soviet Union, executed in his official capacity, an assignment which was a part of the general scheme of recognition of the Soviet Union by the terms of which it assigned to the Government of the United States,

"the amounts admitted to be due or that may be found to be due it (the Soviet Government), as the successor of prior governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, * * *."

Questions as to this assignment must be resolved according to the maxims and principles of the Law of Nations (*Henfield's Case*, 11 Fed. Cas., p. 1089, 1101), which require that a formal engagement between two nations—whether such engagement be in the form of a treaty or of an executive agreement—should be construed as liberally and untechnically as the exigencies of the case may demand in order to effectually carry out the evident or probable design of the parties in executing it. *Ware* v. *Hilton*, 3 Dall. 299; *The Amiable Isabella*, 6 Wheat. 71; *United States* v. *Arredondo*, 6 Pet. 691; *Geofroy* v. *Riggs*, 133 U. S. 267; *Wright* v. *Henkel*, 190 U. S. 40; *Rocca* v. *Thompson*, 223 U. S. 317.

"Such solemn international instruments between independent sovereignties as public treaties, intended primarily for the common advancement of their individual interests, the interests of civilization, and the promotion of international amity, are not to be read as rigidly as documents between private persons governed by a system of technical law, but, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence, should be construed in the light of that larger reason, that broader, fairer and more liberal sense calculated to perpetuate that international concord which constitutes the spirit of the law of nations." (Puente, International Law, p. 228.)

The ultimate design of the two countries in executing this assignment was to transfer "the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America, and the claims of their nationals", to the broad plane of diplomacy, and by placing those claims beyond the reach of vexatious judicial action, to facilitate at one stroke, the adjustment of the delicate points at issue between the two countries. No narrow or strained construction of that instrument is permissible under these circumstances. The funds at issue are admitted to be the balances of the assets of Russian corporations with branch offices here affected by the Soviet decrees whose local business was liquidated by the courts of the State of New York. Matter of *Moscow Fire Ins. Co.*, 255 N. Y. 433. If it be sound, as the appellant contends, that the effect of the Soviet decrees is to vest in the Soviet government complete title to those funds, and to give that government a cause of action to recover them, then, on that hypothesis, we would be bound to hold that the funds in the safe keeping of appellee—an "American national"—are such as "may be found to be due" the Soviet Government within the terms of the assignment; that is, which "ought to be paid" by appellee, or which "may be demanded" by the assignor. 1 Bouvier, Law Dictionary, 3rd Ed. by Rawle, 946; *Ransom* v. *Bidwell*, 89 Conn. 137. The fact that by the terms of the assignment the Soviet Government has renounced its right to sue American nationals who may be indebted to it, is a circumstance strongly urging upon us the broadest possible interpretation of the terms of the assignment. If, however, the effect of the Soviet de-

cree is not such as to vest title to the funds in the Soviet Government, then there would be no question that the funds would not fall within the terms of the assignment and the claims of the appellant must fail. Whether or not the funds here involved are included in the terms of the assignment depend upon the juristic effect of the political act of recognition, and on the degree of extraterritorial force which international comity—the *comitas gentium*—ordains that we should give to Soviet legislation of this character.

The conduct of the international relations of the nation is a matter of state (The Regdai, 278 Fed. 294) which the Constitution has properly placed in the hands of the executive and legislative—that is, the "political" departments of the national government, and the property of whatever may be done in the exercise of this political power is not subject to judicial review or inquiry. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Terrazas* v. *Donohue*, 227 S. W. 206 (Court of Civil Appeals, Tex.). No doctrine of public law is more firmly established than this: that it belongs exclusively to the department constitutionally in charge of the external affairs of the nation to recognize or decline to recognize a new government in an old state or a new state carved out of an old one (*Rome* v. *Himely*, 4 Cranch, 272; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Kennett* v. *Chambers*, 14 How. 38; *Selnicki* v. *Phila. Natl. Bank*, 273 Pa. 110) and to determine, in case of recognition, who is the *de jure* or *de facto* sovereign in such country. *Jones* v. *United States*, 137 U. S. 202; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Agency of Canadian Car & Foundry Co.* v. *American Car Agency*, 258 Fed. 363 (C. C. A. 2). That determination, when made by the political department of the government, concludes our courts on the legal status of such sovereign or government, *Ricaud* v. *Amer. Metal Co.*, 246 U. S. 304; *Jones* v. *U. S.*, 137 U. S. 202, 212; *Republic of Peru* v. *Peruvian Guano Co.*, 36 Ch. Div. (1887) 489.

Recognition is adequately defined as the act by which a state, which is already a member of the community of nations, signifies that it accepts another state as a juristic person of international law, with all the rights and obligations which the law establishes. *A. M. Luther* v. *James Sagor & Co.*, (1921) 3 K. B. Div. 549. While recognition is not necessary to enable a state to maintain its internal sovereignty (*McIlvaine* v. *Coxe's Lessee*, 4 Cranch 209, 212; *Wulfsohn* v. *Russian S. F. S. Republics*, 234 N. Y. 372; *Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 225, 227; Wheaton's International Law, Lawrence's Ed. p. 36), the authorities are nevertheless in accord that it is ordinarily indispensible to make the state's external sovereignty effective, or, to express it differently, to enable the state to become a juristic person of international law. *United States* v. *Hutchings*, 2 Wheeler Cr. Cas. 543, Fed. Cas. No. 15,429; Holland, Lectures on International Law, Walker's Ed., 1933, p. 91; 1 Oppenheim, International Law, 4th ed. 1928, § 71 p. 143; 1 Louter, Le Droit International Public Positif [1920], p. 218; Visscher, Les Gouvernements etrangers en Justice, Revue de Droit International, Ser. III [1922],

v. 3, p. 149; Ullmann, Trattato di Diritto Internazionale Pubblico, tr. by Buzzati, 1914, § 30, p. 184. Recognition clothes a *de facto* state with an international status (*Salimoff & Co.* v. *Standard Oil Co.*, 282 N. Y. 220, 227) and confirms the self-existence of such state (Zeffter, Le Droit International de l'Europe, Bergson's trans. [1883] p. 61). It implies a formal engagement to respect the rights and powers of sovereignty in the new state and to accept its form of government as adequate to express its rational and normal will.

"In recognizing the state, we consequently recognize its legislative capacity; we accept its legislation, both statutory and consuetudinary, as defining the laws of its national existence sufficiently for international purposes." (1 Lorimer, The Institutes of the Law of Nations [1883] 325.)

Recognition, moreover, clothes the state recognized with international capacity to enter into diplomatic relations and to conclude treaties (1 Oppenheim, op. cit., § 75*d*, p. 15, and accepts the validity and efficacy of the acts of the recognized state—be those acts executive, legislative or judicial—and it impresses upon them a retroactive effect from the commencement of the existence of such state or government. Thus, the Supreme Court has said in *Oetjen* v. *Central Leather Co.* (246 U. S. 297, 303), that "recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence." In *Underhill* v. *Hernandez* (168 U. S. 250, 253), the Court said:

"If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation."

The same principle has been accepted by tribunals of respectable authority in other countries. In England, the House of Lords in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* [1933] A. C. 289, decided that—

"The effect of such recognition is retroactive and dated back to the original establishment of Soviet rule which was in the 1917 October Revolution, as was held by the Court of Appeal in Aksionairnoye Obschestve *A. M. Luther* v. *James Sagor & Co.*"

In France, the *Civil Tribunal of the Department of the Seine in De Mayenne* c. *Jeutel*, 55 Clunet, 710 [1926] held that—

"the effect of the *de jure* recognition of the Union of the Soviet Socialist Republics, except as it attempts to take away vested rights, is retroactive and goes back to the day of the commencement of the juridical existence of the new government."

Protected by the retroactive effect of recognition are also legislative (*Murray* v. *Vanderbilt*, 39 Barb. 140, 146) and executive (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Monte Blance Real Estate Corp.* v. *Wolvin Line*, 145 La. 563, 85 So. 242) acts of confiscation.

We must take judicial notice of the recognition of the Soviet Government by our Government on November 16, 1933 (*Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S.

250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *Amer. Metal Co.*, 246 U. S. 304; *City of Berne* v. *Bank of England*, 9 Ves. 347, 32 Repr. 636; *Mighell* v. *Sultan of Jehore* [1894], 1 Q. B. Div. 149, 158, 161, A. C.; *Duff Development Co.* v. *Govt. of Kelantan* [1924], A. C. 797, H. of Lords), and applying the foregoing principles to the state of facts before us, we are bound by the determination of our political department regarding the international legal status of the Soviet Government; that recognition having been accorded, we must accept the Soviet Government as a legitimate governmental authority in Russia, and its institutions and laws as adequate expressions of the national will to meet the requirements of international law; that the effect of the recognition of that Government is to retroact upon and validate for international purposes, all the acts, whether legislative, executive or judicial, of that Government, including the decrees by which the property and assets of the respective insurance companies were affected from October 1917, when that Government came into power.

But, as each nation can legislate only for itself (The Antelope, 10 Wheat. 66, 122), to hold, as we must, that the recognition of the Soviet Government is retroactive and that its actions are validated, in our judgment, does not answer the question on which these cases necessarily revolve, namely, whether the legislation of the Soviet Government, as it affects these insurance companies, should be recognized and applied by our courts so as to vest in the Soviet Government title to the assets of the corporations located here and thus enable that Government to assign such title to the United States as it purports to do. That question is not free from intrinsic difficulties, and the studied views of those who have considered and written on the subject, and the *obiter dicta* of the courts as they have had occasion to comment on it, are far from being in agreement. Realizing that for the first time, perhaps, in the judicial history of this country the courts have been called upon by a foreign power, with whom we are now in relations of amity, to give extraterritorial effect with respect to property located here, to its admittedly confiscatory legislation, requires that we approach the subject with caution. That the legislation of each State is local in character and has no force *proprio vigore*, beyond its jurisdiction, is a principle flowing from and in entire harmony with the dominent conceptions of political science in every land. In the case of *The Apollon* (8 Wheat. 362, 370) [1824], Mr. Justice Story said:

"The laws of no nation can justly extend beyond its own territory, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons upon whom the legislature have authority and jurisdiction."

This general principle has been followed down to the present time without any material variation. *Canada Southern R. Co.* v. *Geb-*

hard, 109 U. S. 527, 536; *Huntington* v. *Attrill*, 146 U. S. 659, 689; *Hilton* v. *Guyot*, 159 U. S. 113, 163; *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404 (C. C. A. 2). It is also accepted in the English courts (*Sedgwick Collins & Co.* v. *Russian Ins. Co.* [1925] 1 K. B. Div. 1, 15). The principle is given even a more rigorous application with respect to foreign laws or judgments which are contrary to morals, to public policy, or prejudicial to local interest (*Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378), or are of a penal character (*Baglin* v. *Cusenier*, 221 U. S. 580; *Huntington* v. *Attrill*, 146 U. S. 657, 667; Wharton, A Treatise on the Conflict of Laws, 2d Ed. [1881] § 4).

But, within the sphere of sovereignty enacting it, that legislation is effective to regulate fully the status of all persons and things therein, and to determine the juristic effect of every act or relationship done or established under it. To the full force of this principle, the respective insurance companies had to yield their unqualified assent. They came into being under the laws of an imperial sovereign; they lived many years under the imperium of those laws; and in 1918 a new sovereign power, the legitimacy of which has been explicitly accepted by our Government, cut short their lives; it took over their corpus—their properties and assets. Such was the fate of these corporations in territories subject to Russian jurisdiction. As to the fate of the branches of these corporations here, the problem is not simple, for there the acts of the Russian Government may clash with local conceptions of private international law or policy.

That the continuity and conditions of juristic personality depend on the pleasure of the legislator who creates it may safely be admitted. 9 Holdsworth, A History of English Law [1926], p. 48.

In *Canada Southern R. Co.* v. *Gebhard* (109 U. S. 527, 537), the Supreme Court said:

"Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia*, 8 Wall. 168), but, it admitted, it must, in the absence of legislation equivalent to make it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

And there is no reason why the suppression of a juristic person by the legislative act of a sovereign which created it, should be regarded by the courts of other countries as contrary to their public policy. The fortune that betakes a corporation under the law which created and controlled it, betakes in like measure the branch offices both at home and abroad. The reason for this is that a branch office is nothing more, in the eyes of the law, than a prolongation of the life of the foreign corporation, without independent juristic exist-

ence of its own. This is the posture taken on repeated occasions with regard to the branch offices of these extinct Russian corporations, by the courts of Poland (*Affaire de Julien Muszkat* c. *Soc. d'Assur. Rossia* [1929], Supt. Ct., 58 Clunet, 770, 771); France (*Banque generale pour de Commerce etranger* c. *Jaudon* [1924], Trib. civ. Seine, 52 Clunet, 419, 420; *Cie. Nord de Moscou* c. *Phenix Espagnol* [1928] Cour d'Appel, Paris, 56 Clunet, 119, 130; *Soc. Vairon et Cie.* c. *Banque de Commerce de Siberie* [1928] Sirey, Rec. Gen., Jour. du Pal., 161, Cour d'Appel, Bordeaux); and Switzerland (*Banque internazionale de Commerce de Petrograd S. A.* [*Succursale de Geneve*] c. *Hausner* [1924], Trib. Federal, 52 Clunet 488). It is also the position taken by the British courts in *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [1923], 2 K. B. 682, C. A., Scrutton, L. J. And in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* [1933], A. C. 289, Lord Wright said:

"English courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. * * * But as the creation depends on the act of the sovereign state which created them, the annulment of the act of creation by the same power will involve the dissolution and nonexistence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact."

The same rule was recognized in *Russian Reinsurance Co.* v. *Stoddard, Jr., Supt. of Ins.*, 240 N. Y. 149, 154. But the Court of Appeals of New York, in recent cases, seems to have adopted what may be called the organic theory of juristic personality in opposition to the fictional theory which to this day has held a predominant position in the field of legal philosophy and judicial history and is the theory of our own law. Thus in *Petrogradsky M. K. Bank* v. *National City Bank* (253 N. Y. 23, 28 [1930]), the court said:

"We think the plaintiff is not dissolved, but is still a juristic person with capacity to sue."

In *Severnoe Securities Corp.* v. *London & Lancashire Ins. Co. Ltd.* (255 N. Y. 120, 122 [1931]), a Russian corporation, whose juristic personality was in dispute, was declared to retain "a pallid life as the shade or little more of its former self." In Matter of People (Russian Reinsurance Co.) (255 N. Y. 415, 425 [1931]), the Russian corporations were declared to be "still juristic persons." In *Salimoff & Co.* v. *Standard Oil Co.* (262 N. Y. 220, 225 [1933]) in speaking of Russian banking and insurance corporations, the court observed that

"* * * corporations nonexistent in Soviet Russia have been, like fugitive ghosts endowed with extraterritorial immortality, recognized as existing outside its boundaries. The juristic person, the Russian corporation, dead in the country which created it, has received juridical vivification elsewhere."

This reasoning in the cases referred to coming before the Court of Appeals prior to the recognition of the Soviet Government, might have some theoretical justification, on the ground, possibly, of the technical continuity of the ancient Russian regime (*Rome* v. *Mimely*, 4 Cranch, 272; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Re Ambros Light*, 25 Fed. 412) and the presumed illegality of the new (*Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 224), a view, however, which has not passed unchallenged by high authority (*Banque Internationale de Commerce de Petrograd S. A.* [*succursale de Geneve*] c. *Hausner* [1924], Trib. Federal, Switzerland, 52 Clunet, 488). But that the logic of these cases should be extended, as is pretended (*Vladekavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378), to acts whose legality we have tacitly approved when we recognized the government under whose authority they were done, is clearly a breach of the comity which one nation owes another. So singularly frail is the foundation of such reasoning when applied after an act e. g. recognition—which necessarily must alter the judicial application of legal thories, the New York Court of Appeals stands alone on this proposition. In this holding, it goes against the current of authority, and controlling principles of public international law which nations in relation to mutual friendliness must observe toward each other. Considering the matter as a question of fact—i. e., failure of proof of extinction—and not of legal theory, as the New York courts have done, the House of Lords of England held in 1925 that banking corporations were not dissolved by Russian nationalization decrees of December 14, 1917 (*Russian Commercial & Industrial Bank* v. *Compitor d'Escopte de Mulhouse* [1925] A. C. 112, 134, L. H.; *Banque International de Commerce de Petrograd* v. *Goukassow* [1925] A. C. 150 H. L.).

Passing from the imponderables of juristic theory—corporate personality—to its ponderables—corporate assets—we invoke, in a truer and broader sense, the application of principles of public and private international law which must be made to coexist and to cooperate toward the adoption of a policy of substantial justice.

A practical result of the political sovereignty of each country is the right of each to change its political institutions at discretion, and to legislate concerning its own interests according to its convenience and needs. See Webster, Jan. 12, 1852; *King of Prussia* v. *Kuepper's Admr.*, 22 Mo. 550 [1856]; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 83.

Thus, in the exercise of the right accorded to every State by the most widely accepted of all the principles of the law of nations, the Soviet Government nationalized the business of insurance in which these companies were engaged, and confiscated their property. No doubt exists that the operation of the laws of a foreign state often transcend, and necessarily so, their territorial orbit of action. What gives them force in other jurisdictions is the comity between nations which calls on the representatives of each sovereign state to observe a mutual respect in considering the effects of such of

their official acts as project themselves into a foreign jurisdiction. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404, 409 (C. C. A. 2); *Hilton* v. *Guyet*, 159 U. S. 113, 163; *Sedgwick Collins & Co.* v. *Rossia Ins. Co.* [1926] 1 K. B. 1, 17, C. A. And, as a general rule, the acts of the recognized government when invoked by litigants in the forum of a freindly nation, will not be permitted to be impeached. "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U. S. 250, 252. The reason, of course, is that to permit the validity of those acts to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 304.

Two possible grounds exist for refusing to give the Soviet decree extraterritorial application. One is public policy; the other is its penal character—assuming it is penal. The conception embodying the idea of public policy is wrapped in considerable vagueness as is generally admittel. *Hadden* v. *Barney*, 5 Wall. 107; *Egerton* v. *Brownlow*, 4 H. L. Cas. 1, 123. The view expressed concerning public policy by these, the highest tribunals of England and the United States, warn against the danger of taking uncertain and unsatisfactory concepts as the deciding yardstick according to which the legislation of the recognized Government of Russia is to be accepted or rejected in our courts. Considerations of an international character urge us to accept with great reluctance, a local conception of public policy as the determining factor in the relations between friendly nations. Is the confiscatory legislation of a recognized government, which produces effects only within its own jurisdiction, and respecting its own nationals or foreigners, per se, against public policy? Certainly not. Speaking of the confiscatory legislation of the State of Georgia in 1782, which expropriated the property of British loyalists, and particularly that of Wright, the provincial governor, during our Revolutionary period, the Lord Chancellor of England, as far back as 1788, said in *Wright* v. *Nutt* (1 H. Blackstone, 136, 149, 126 Repr. 83, 89):

"It may be a question for private speculation, whether such a law made in Georgia was a wise or an improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an indepe[illegible]ent country, and the laws of every country must be equally regarded in courts of justice here, whether in private speculation they are wise or foolish."

This original principle has been accepted without question in subsequent adjudications involving our own nationals and nationals of the country putting such legislation into effect. *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Murray* v. *Vanderbilt*, 39 Barb. 140, 146.

Is such legislation against public policy if it seeks extraterritorial application? Gratuitous expressions in the courts of New York, England and France, give the impression that they would hold—if the occasion arose—that any infringement of the right of private property, which operates upon property situated in those jurisdictions, would be against their public policy.

But in close analysis, it will be found that many of these expressions were unnecessary to the decision of the actual question before the courts and they do not apply to the specific problem before us. The cases there referred to concern the protection of rights acquired locally, such as the payment of debts, the enforcement of contracts, and the right of succession under the local law, all of which come properly under the operation of well established principles of private international law. On the other hand, there is much authority in the decisions to the effect that there is nothing in the confiscatory legislation of a recognized government which can be against the public policy of the recognizant state, even when the legislation of the former is judged exclusively according to the local conceptions of the latter rather than by general standards. While there is a divergence of opinion on the question whether the Soviet decrees of nationalization are contrary to public policy, it is well to bear in mind the admonition of the Supreme Court in *Hedden* v. *Berney*, *supra*, against the practice of permitting judicial tribunals to decide according to their unchecked discretion what should be the public policy of a nation, particularly on a question of international concern. The known practice of the executive department of the nation pronouncing the public policy of the nation should be controlling upon the courts in such instances.

The public policy of the country may be declared in the Constitution. and if that instrument is silent the three departments of the Government have the power within their respective spheres to declare what the public policy is: the executive, by proclamation or some other authoritative act; the legislative, by statute; the judiciary by judicial decisions. The Chief Executive, acting as the constitutional organ of international relations, may declare, in the course of the administration of the affairs of the Nation, its public policy with respect to any question within his legitimate competency. The act of recognition of a foreign government may import the equivalent of a definite declaration of policy which the courts would be bound to notice. Should we for any reason disapprove of the policies of a foreign government which seeks our recognition, we would be within our rights in declining to recognize it on that ground solely. In *A. M. Luther* v. *James Sager & Co.* [1921] (3 K. B. 532), it appears that the Soviet Government had been extended *de facto* recognition by the British Government. It was contended that the confiscatory decrees of that Government were in their nature "so immoral and so contrary to the principles of justice" as recognized in England that the courts should disregard them, Lord Scrutton saying:

"Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the courts could investigate the title without infringing the comity of nations. But it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will."

While we have said that recognition is retroactive and that its effect is to preclude the tribunals of the recognizant state from questioning the validity or legality of the actions of the government recognized, and that it invalidates, so far as concerns the tribunals of the recognizant state, transfers of property and other transactions which before recognition would have been treated as invalid by those tribunals (1 Oppenheim, International Law, 4th Ed. [1928] §75d, p. 155; Harvey, The Legal Effects of Recognition in International Law [1928] 82, 87), an important qualification of this general principle must be formulated, and that is, that as in the interregnum between the establishment of a foreign government in power and its recognition by this Government, it cannot be said to be entitled to any comity and its legislation to any respect (*Rose* v. *Himely*, 4 Cranch, 272; *Gelston* v. *Hoyt*, 3 Wheat, 246) at our hands during such period whatever has been done in the courts, with legal finality, must be regarded as *res judicata* and valid as against the world. So that in establishing a new policy or changing an old one, the act of recognition must be understood to have effect only from the date it actually takes place as to questions which are *res judicata* and irrevocable, but as to questions which are still pending or not affected with litigation, or which are political in nature, the effect must be understood as from the commencement of such government. Therefore, during the interregnum, the corporations were correctly regarded here (because of the refusal of our courts on grounds of public policy to give effect to the Soviet legislation), as a juristic person, and as such subject to the application of the principles of private international law, the most frequently invoked in these Russian cases having been the *lex rei situs* and the *lex loci contractus*. *Salinoff & Co.* v. *Standard Oil Co.* 262 N. Y. 220; *Sedgwick Collins & Co.* v. *Rossia Ins. Co.* [1926] 1 K. B. 1; In re *Russian Bank for Foreign Trade* [1933] Chancery 745; *Egger* v. *La Baloise-Vie* [1924] Triv. civ. Seine, 52 Clunet, 1006.

In any litigation between private individuals putting in opposition the laws of respective countries the conflict must be resolved according to the rules of private international law. The principle which during such interregnum applied to the branch offices of these corporations in this country, was clearly formulated in the Treaty on International Commercial Law of Montevideo [1889] (art. 6) as follows:

"The branches or agencies established in a State by a corporation domiciled in another, shall be considered as domiciled in the place where they do business and subject to the jurisdiction of the local authorities regarding the business which they may do."

Under this qualification of the general principle of the retroactivity of the act of recognition, the rights which the Soviet Government acquired here with respect to these companies and their assets under the decree of nationalization must date only from the date of actual recognition—that is, November 16, 1933; but as to what occurred before, the rights of the Soviet Government must be understood as subordinate to and regulated by the principles of private international law to the extent which those principles govern the rights of our nationals or inhabitants acquired under our laws in the course of business with the companies prior to actual recognition. Anything adjudicated by our courts subsequent to the date of actual recognition must, therefore, be treated as void.

When, therefore, the Soviet Government was recognized, the courts lost all right to continue to inject their prerecognition conceptions of public policy into the international panorama in manifest derogation of the express determination of the political department and the clear juridical implications of the act of recognition. As said by Lord Scrutton, L. J. in *A. M. Luther* v. *James Sagor & Co. supra:*

"But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized. The English Courts act on the rule 'that an intention to take away the property of a subject without giving him a legal right to compensation for that intention is expressed in unequivocal terms': *Central Control Board* v. *Cannon Brewery Co.* If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or nonrecognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges."

The Russian decrees extinguished the lives of these companies and appropriated their property and general assets. If those decrees were effective to extinguish their lives abroad as well as at home, why should it not be effective also to take over their property and assets abroad where the companies had branches, to as full an extent as at home, if our political department has made a public

declaration of policy with respect to such legislation which validates it, and the rights of those who have claims against the corporations are safeguarded by our courts under the qualification of the principle of retroaction indicated and the established principles of private international law? When, then, our Government recognized that of Russia, it also recognized its legislation. By that legislation, the government of the Soviets ended the lives of these corporations and took over their assets. That legislation this court is bound to recognize and apply since November 16, 1933, as to matters *res judicata*, in as full a measure as our political department has recognized it, and we are foreclosed from further questioning it by the very act of recognition. Recognition changes a policy of official disfavor into an attitude of graceful acquiescence. To impeach this legislation now in the courts as being against our public policy would clearly trench upon the sphere of the executive who has already decided the matter in a manner that concludes our courts.

As to the question whether the Russian decree is of a penal character, I do not hesitate to say that I cannot so regard it. A statute is penal if it inflicts a penalty for the violation of some of its provisions (*Huntington* v. *Attrill* (1893) A. C. 150, 156, H. of L.; 3 Bourvier's Law Dictionary, 3rd ed. by Rawle, 1914, p. 2551), or, if it fixes upon a wrongdoer any extraordinary liability in favor of the person wronged, not limited to the damages suffered (*Huntington* v. *Attrill*, 146 U. S. 657, 667). It is evident that the reported cases do not indicate that they are vitiated with the criminal or tortious elements which these definitions involve. In *Baglin* v. *Cuzenier* (221 U. S. 580) and *Lecouturier* v. *Roy* (1910) (A. C. 262) which have been cited by counsel as authority against the retroactivity of the supposedly confiscatory legislation of the French Government, must be considered in the light of the French law—the Loi relative au contrat d'association, of July 1, 1901, 63 Bull. des Lois, 12 c. ser., II Sem. (1901), pt. princ., p. 1273)—art. 19 of which provides:

"The provisions of art. 463 of the penal code shall apply to offenses contemplated by the present law."

That law clearly fell within the terms of the first portion of our definition.

The right of the United States to sue in the national court has been questioned on the ground that the balances claimed by appellant are now, as it is alleged in process of adjudication in the state courts, and the majority opinion turns upon this question. To uphold the jurisdiction of the State courts, and avoid giving extra-territorial effect to the Soviet decrees, the majority opinion has taken the unwarranted position that the effect of the dissolution of the insurance company upon its assets was to debase the sovereignty of the State to the status of the corporation. The majority opinion reads: "Consequently we must for present purposes take the Soviet Government to have become to all intents and purposes the Russian insurance corporation in Russia which owned the deposit in New York subject to the fulfillment of the conditions upon which the deposit was made with the New York Superintendent of Insurance."

This position, of course, reverses law, logic, and fact. It reverses law because the dissolution of the corporation and the nationalization of its property did not lower the Soviet Government to the plane of the private litigant without its express consent; it reverses logic because such dissolution did not assimilate the Russian Government with a corporation which was legally nonexistent; and it reverses fact because such nationalization could not involve a debasement of sovereignty. On the contrary, the dissolution and nationalization had the effect of absorbing the assets of the corporation into the rest of the public assets and placing them beyond the reach of the processes of the tribunals of foreign states. Art. 3, § 2 of the Constitution, says:

"the judicial Power shall extend * * * to Controversies to which the United States shall be a Party."

Section 41 of the Judicial Code gives the District Courts original jurisdiction of—

"All suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue."

The government is clothed with full juristic capacity to come into its own courts, either as a party plaintiff or an intervenor, to protect or claim its lawful rights. Of this there can possibly be no doubt. But it is said that since the state courts first acquired jurisdiction and control over the *res*, the United States courts lack authority, under the doctrine of jurisdictional priority repeatedly announced by the Supreme Court (*Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 88; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *Wabash R.* v. *Adelbert College*, 208 U. S. 38; *Farmers Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 61; *Byers* v. *McAuley*, 149 U. S. 608, 614; *Merritt et al.* v. *Amer. Steel-Barge Co.*, 79 Fed. 228 (C. C. A. 8), to entertain these suits and to proceed therein as prayed. To this general principle which, as has been said, is a principle "of right and law, and therefore, of necessity" (*Covell* v. *Heyman*, 111 U. S. 176, 182), and "essential to the dignity and just authority of every court" (*Buck* v. *Colbath*, 3 Wall. 334), I, of course, subscribe. But I perceive no conflict between this salutary rule and the suits brought by the United States in its own courts, if the principles of the retroactivity of recognition and the extraterritoriality of the legislation of a foreign government within the limits already indicated, are regarded in the proper light, and in that light applied to the questions before us.

Upon matters which were *res adjudicata* on November 16, 1933—the date of recognition of the Soviet Government—under principles of private international law underlying questions of this character, such recognition can have no disturbing effect; upon matters which were pending or not decided with the authority of finality on the date of recognition and which involved the properties or assets of

nationalized Russian companies not affected with the application of principles of private international law, it is clear that whatever was done in the State courts was done at the risk of a declaration of nullity, for the courts should have known that they were dealing with the properties or assets of a foreign government whose confiscatory legislation we have approved by the very fact of recognition and by taking an assignment comprising in many instances the fruits of such legislation. Therefore, on the date of recognition the State courts lost jurisdiction and control of the properties and assets in question. The United States was at liberty to proceed in its own courts, without ousting the State courts of jurisdiction, or, of delaying or obstructing the State courts in the exercise of their jurisdiction, or of leading to a conflict of authority between the Federal and the State courts (*Merritt* v. *American Steel-Barge Co.*, 79 Fed. 228 [C. C. A. 8]). In other words, and as a limitation to the principle of jurisdictional exclusion on the grounds of priority, the "possession of the officer of court" was discharged (*Buck* v. *Colbath*, supra) by the act of recognition, as to those matters or claims not affected with the application of principles of private international law. It was, therefore, within the competency of the district courts to entertain the suits filed and to issue the injunctive relief prayed by the United States, since § 265 of the Judicial Code, which forbids the Federal courts "to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy", must be construed in connection with § 262 which authorizes the Federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 228. It may not be maintained that, if after November 16, 1933, the State courts lost jurisdiction over the assets of the recognized Russian Government, any injunction issuing from a court of the United States would act to stay proceedings in any court of the State within the meaning of the statute. No proceedings can be stayed, no ousting of jurisdiction or custody can occur, no delay or obstruction in the exercise of jurisdiction can take place, no conflict of authority can happen, where lawful jurisdiction is wanting by operation of law.

The decree should be reversed.

United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 27th day of May, one thousand nine hundred and thirty-five.

Present: Hon. MARTIN T. MANTON, Hon. AUGUSTUS N. HAND, Hon. HARRIE B. CHASE, *Circuit Judges*.

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UNITED STATES, PLAINTIFF-APPELLANT

vs.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, DEFENDANT-appellee

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed, that the decree of said District Court be and is hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

(Endorsement on cover:) United States Circuit Court of Appeals, Second Circuit. *United States* vs. *President and Directors of the Manhattan Company.* Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 27, 1935. William Parkin, clerk.

United States of America, Southern District of New York

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 147, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of United States, plaintiff-appellant, against president and directors of the Manhattan Company, defendant-appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 27th day of June, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and fifty-ninth.

[SEAL] WM. PARKIN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1935

149 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 197

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LOUIS H. PINK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1935
CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

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In United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827, defendant-appellee

Statement under rule 13

On November 14, 1934, the above-entitled suit was commenced by the complainant, United States of America, against the defendant, George S. Van Schaick, by filing a verified bill of complaint in the District Court for the Southern District of New York, and by the issuance of a subpoena. On November 26, 1934, the defendant filed a notice of appearance. On December 7, 1934, an order to show cause, supported by affidavit, was signed, temporarily restraining defendant and requiring defendant to show cause on December 11, 1934, why complainant's motion for an injunction pendente lite should not be granted.

On December 8, 1934, an order to show cause, supported by affidavit, was signed, requiring complainant to show cause on
2 December 11, 1934, why the bill of complaint should not be dismissed for failure to state facts sufficient to constitute a cause of action.

Pursuant to a notice of motion of the defendant served on the complainant and an order of the District Court made thereon, complainant filed on December 10, 1934, a bill of particulars of the bill of complaint. Argument was had on the motion to dismiss the complaint and on the motion for an injunction pendente lite before Honorable Alfred C. Coxe, United States District Judge, on December 18, 1934. On December 20, 1934, there was filed an order and decree denying complainant's motion for an injunction pendente lite and granting defendant's motion to dismiss the complaint for insufficiency and suspending the operation of the order and decree until the determination of the appeal by the complainant. On December 22, 1934, the appeal was allowed.

In United States District Court

Subpoena

Equity Subpoena Form No. 97
Eq. Vol. 79, page 160

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827:

GREETING: You are hereby commanded to appear before the Judges of the District Court of the United States of America
3 for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said court in a suit in equity, by United States of America and to further do and receive what the said court shall have considered in this behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

WITNESS, Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 14th day of November, in the year One Thousand Nine Hundred and Thirty-four, and of the Independence of the United States the One Hundred and Fifty-ninth.

MARTIN CONBOY,
United States Attorney, Solicitor for Complainant, U. S. Courts and P. O. Bldg., Broadway and Park Row, New York City.

CHARLES WEISER, *Clerk.*

The defendant is required to file his answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service, otherwise the bill aforesaid may be taken pro confesso.

[SEAL] CHARLES WEISER, *Clerk.*

4 In United States District Court, Southern District of New York

Equity E 79–160

UNITED STATES OF AMERICA, COMPLAINANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827, defendant

Complaint

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The United States of America, by its attorney, Martin Conboy, United States Attorney for the Southern District of New York, complains of the defendant herein and alleges on information and belief:

I

That the complainant herein is a corporation sovereign and body politic.

II

That the defendant was at all times hereinafter mentioned and now is Superintendent of Insurance of the State of New York.

III

That the First Russian Insurance Company, Established in 1827, at all the times hereinafter mentioned, with the exceptions hereinafter noted, was a corporation organized under the laws of the State of Russia, to transact the business of insurance, and was authorized by compliance with the requirements of the laws of the State of New York to transact such business in this state; that the said Insurance Company, as part of its compliance with the requirements of the laws of the State of New York, deposited with the Superintendent of Insurance as a fund out of which should be paid the claims of domestic creditors of said corporation, cash, securities, and other items of value; that the First Russian Insurance Company, Established in 1827, possessed assets and items of value in the United States other than and in addition to the said fund deposited with the Superintendent of Insurance.

IV

That heretofore and in the latter part of 1917 and the early part of 1918, or thereabouts, the said First Russian Insurance Company, Established in 1827, was, by decree of the Russian State, dissolved and all of its right, title, and interest and all the right, title, and interest of all its stockholders in its property, including the deposit hereinbefore mentioned with the Superintendent of Insurance of the State of New York, and the other assets of the First Russian Insurance Company, Established in 1827, in the United States
6 hereinbefore mentioned, were confiscated and expropriated by the said Russian State.

V

That on or about August 8, 1925, pursuant to an order of the Supreme Court of the State of New York, entered in the office of the Clerk of the County of New York on the 8th day of August 1925, as resettled by an order of said Court dated and entered the 11th day of September 1925, James A. Beha as the Superintendent of Insurance of the State of New York took possession of the property of the domesticated United States Branch of the First Russian Insurance Company, Established in 1827, under Section 63 of the Insurance Law of the State of New York.

That subsequently pursuant to Section 63 of the Insurance Law of the State of New York and the aforesaid orders of the Supreme Court of the State of New York, James A. Beha, as Superintendent of Insurance of the State of New York, and his successor in office, George S. Van Schaick, proceeded to liquidate the business of the domesticated United States Branch of First Russian Insurance Company, Established in 1827, and as a result thereof all domestic claims have been adjudicated and allowed, leaving undisposed of certain foreign claims which arose in the conduct of the business outside of the United States.

That on August 24, 1934, there remained in the custody of George S. Van Schaick as Superintendent of Insurance of the State of New York, as liquidator of the domesticated United States
7 Branch of First Russian Insurance Company, Established in 1827, cash securities and other assets having a value of $1,170,783.36.

VI

That among the persons who have filed, against the fund now in the possession of the defendant herein, claims arising out of the foreign business of the First Russian Insurance Company, Established in 1827, are Messrs. Campbell and Whipp, Attorneys at Law, residing in the City of New York, and Dr. M. Imchanitzky, residing in the City of New York. That the claims of these persons have been allowed in the sum of $128,010.58 and $38,403.17, respectively, and

that an order was made by the Supreme Court of New York, New York County, Special Term, on February 26, 1934, instructing the defendant herein to pay these respective sums to the claimants with interest thereon from June 16, 1931. That on appeal by the said George S. Van Schaick, Superintendent of Insurance, the aforesaid order of the Supreme Court of New York, New York County, Special Term, was affirmed by the Supreme Court of New York, Appellate Division, First Department, in a decision dated June 15, 1934. That from the aforesaid order of the Supreme Court of New York, Appellate Division, First Department, an appeal has been taken by said Superintendent of Insurance to the Court of Appeals of the State of New York which appeal is to be heard during the forthcoming term of said Court. That in the event that the decision of the Supreme Court of New York, Appellate Division, First Department, should be affirmed by the Court of Appeals, the defendant herein will be required to pay out to the claimants above described, Messrs. Campbell and Whipp, and Dr. M. Imchanitzky, the sums of $128,010.58 and $38,403.17, respectively, with interest thereon from June 16, 1931. That as a result of such payments the fund in the hands of the defendant herein will be correspondingly diminished.

VII

That on or about November 16, 1933, the Russian State assigned to the complainant for a valuable consideration all of its right, title, and interest in and to the aforesaid cash, securities, and other assets, and also assigned to the complainant all the right, title, and interest of all Russian nationals in and to the aforesaid cash, securities, and other assets, and since November 16, 1933, the complainant has been and now is the sole and exclusive owner, entitled to the immediate possession of the aforesaid cash, securities, and other assets now in the possession of the defendant.

VIII

That prior to the institution of this suit, complainant duly demanded of the defendant the said cash, securities, and other assets, together with the proceeds and avails thereof, but the defendant has refused to deliver the same or any part thereof to the complainant and continues wrongfully to withhold the same from the complainant, and now wrongfully possesses the said cash, securities, and other assets or the avails thereof. That as to the complainant since November 16, 1933, the possession of said property by the defendant has been wrongful and the defendant still wrongfully detains the same from the complainant.

IX

That by reason of the defendant's possession of the cash, securities, and other assets described in paragraph V of this complaint, and by

reason of the defendant's wrongful refusal to deliver these assets or any part thereof to the complainant and by reason of the defendant's continuing to wrongfully withhold the same from the complainant, the defendant holds the same for the complainant as fiduciary and trustee for the complainant.

X

That the complainant has no complete, plain, and adequate remedy at law for the relief sought herein and therefore institutes this suit in equity.

Wherefore, the complainant prays:

(a) that a subpoena issue to the defendant named herein, commanding it to appear on a certain day and answer this bill of complaint and to abide by such orders and decrees as this Court may make in the premises;

(b) that the defendant herein, his successors, officers, agents, attorneys, or employees, and all persons or corporations acting under his direction or in his behalf be enjoined and restrained permanently and pending the determination of this suit from paying out or distributing to anyone other than this complainant any part of the said cash, securities, and other assets or the avails thereof, except such portion of these assets as the defendant herein has been directed by an order of the Supreme Court of New York, New York County, Special Term, in the proceeding described in paragraph V of this complaint to retain in a special account for the purpose of meeting expenses of administration;

(c) that the defendant be required by a decree of this Court to make a full, just, and complete account under the direction of this Court, and to pay over to the complainant the aforesaid cash, securities, and other assets and the proceeds and avails thereof and all interest, dividends, gains, and profits as have accrued or arisen or have been earned or received therefrom by the defendant since August 24, 1934, and all such gains or profits as would have accrued to the complainant but for the wrongful detention of said cash, securities, and other assets by the said defendant, and all damages the complainant may have suffered or sustained thereby;

(d) that the complainant may make such other and further relief as the case may require and the court may deem just in the premises.

MARTIN CONBOY,
United States Attorney for the Southern District of New York, Attorney for Complainant; Office and P. O. Address, U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

11 [*Duly sworn to by Leon E. Spencer, jurat omitted in printing.*]

12 In United States District Court, Southern District of New York

[Title omitted.]

Order to show cause

On the annexed affidavit of Leon E. Spencer, Assistant United States Attorney for the Southern District of New York, sworn to on the 7th day of December 1934, and on the verified bill of complaint filed herein on the 14th day of November 1934; and

It appearing that on December 4, 1934, the Court of Appeals of New York rendered a decision without opinion affirming the orders of the Supreme Court of New York, Appellate Division, First Department, which affirmed orders of the Supreme Court of New York, New York County, Special Term, instructing the defendant herein to pay the sums of $129,010.58 and $38,403.17 out of the cash, securities, and other assets referred to in the com-

13 plaint herein and as is more fully set forth in paragraph VI of the complaint herein; and

It further appearing that orders on the remittiturs of the Court of Appeals may be served upon the defendant immediately or within the next few days which will require the defendant to pay the aforesaid sums of $128,010.58 and $38,403.17 out of the said cash, securities, and other assets referred to in the complaint herein; and

It further appearing that as a result of these payments, the said cash, securities, and other assets in the hands of the defendant herein will be correspondingly diminished before an adjudication of the rights of the complainant herein to these funds can be determined by this Court; and

It further appearing that payment of the aforesaid sums of $128,010.58 and $38,403.17 out of the said cash, securities, and other assets referred to in the complaint herein will cause great, immediate, and irreparable injury and damage to the complainant herein by reason of the fact that the said cash, securities, and other assets will be diminished, by reason of the fact that the defendant herein, an officer of the State of New York, cannot be required to respond in damages to the complainant for said payments made pursuant to orders of the Supreme Court of the State of New York; and

It further appearing that the Court in the case of United States v. Bank of New York and Trust Company and the case of United States v. President and Directors of Manhattan Company by orders to show cause dated August 22, 1934, and August 25, 1934,

14 respectively, granted temporary restraining orders restraining and enjoining the defendants therein from paying out the funds there involved; and

It further appearing that the aforesaid restraining orders in the aforesaid cases are now in complete force and effect; and

It further appearing that this Court, on November 30, 1934, filed an opinion in the case of United States v. Bank of New York and Trust Company and in the case of United States v. President and Directors of Manhattan Company dismissing the complaints and denying motions of the complainant for injunctions pendente lite upon which orders of this Court have not yet been entered; and

It further appearing that upon the presentation for settlement of orders in the aforesaid cases dismissing the complaints and denying motions of the complainant for injunctions pendente lite, the complainant in the aforesaid cases will present orders continuing the aforesaid restraining orders now in force pending the determination of the complainant to take an appeal and pending the determination of such appeal; and

It further appearing that in order to enable this Court to adjudicate the rights of the complainant to the cash, securities, and other assets referred to in the complaint, and to effectively exercise its jurisdiction and enforce its judgment it is necessary and proper that the aforesaid cash, securities, and other assets remain in possession of the defendant pending the adjudication by this Court of the rights of the complainant, it is

Ordered that the defendant be and appear before this Court
15 at a Stated Term thereof for the hearing of motions to be held on the 11th day of December 1934, in Room 235 of the Old Post Office Building, in the City, County, and Southern District of New York, Borough of Manhattan, at the hour of 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, then and there to show cause, if any he has, why the defendant, his agents, attorneys, employees, assignees, successors, and all persons or corporations acting under his direction, or in his behalf, or in privity with him claiming so to act, should not be enjoined and restrained permanently and pending the determination of this suit from paying out or distributing to anyone other than this complainant any part of the cash, securities, and other assets or the avails thereof except such portion of these assets as the defendant herein has been directed by an order of the Supreme Court of New York, New York County, Special Term, to retain in a special account for the purpose of meeting expenses of administration of the proceeding in the Supreme Court under Section 63 of the Insurance Law of the State of New York to liquidate domestic claims adjudicated and allowed therein as set forth in paragraph 5 of the complaint herein; and it is

Further ordered that meanwhile the defendant herein, his successors, officers, agents, attorneys or employees and all persons or corporations acting under his direction or in his behalf be and they are hereby stayed, restrained and enjoined from distributing any of the cash, securities and other assets pending the determination of this motion.

16 Let service hereof be made upon the defendant by service personally upon the defendant or his representative of a copy, which need not be certified, on or before December 7, 1934.

Dated, New York, N. Y., December 7th, 1934.

HENRY W. GODDARD,
United States District Judge.

In United States District Court, Southern District of New York

[Title omitted.]

Affidavit attached to order to show cause

STATE OF NEW YORK,
County of New York, Southern District of New York, ss.:

Leon E. Spencer, being duly sworn, deposes and says:

17 1. That he is an Assistant United States Attorney for the Southern District of New York in charge of the above-entitled matter.

2. That the First Russian Insurance Company, Established in 1827, at all the times hereinafter mentioned, with the exceptions hereinafter noted, was a corporation, organized under the laws of the State of Russia, to transact the business of insurance, and was authorized by compliance with the requirements of the laws of the State of New York to transact such business in this State; that the said Insurance Company, as part of its compliance with the requirements of the laws of the State of New York, deposited with the Superintendent of Insurance as a fund out of which should be paid the claims of domestic creditors of said corporation, cash, securities and other items of value; that the First Russian Insurance Company, Established in 1827, possessed assets and items of value in the United States other than and in addition to the said fund deposited with the Superintendent of Insurance.

3. That heretofore and in the latter part of 1917 and the early part of 1918, or thereabouts, the said First Russian Insurance Company Established in 1827 by decree of the Russian State, and particularly by decree of the Russian State on the organization of the insurance business in the Russian Republic, a photostatic copy of a certified copy of which and a photostatic copy of a certified translation of which are attached hereto and made a part hereof as Exhibit A,

18 was dissolved and all of its right, title and interest and all the right, title and interest of all its stockholders in its property, including the deposit hereinafter mentioned, with the Superintendent of Insurance of the State of New York and the other assets of the First Russian Insurance Company established in 1827, in the United States, hereinafter mentioned, were confiscated and exappropriated by said Russian State.

4. That on or about August 8, 1925, pursuant to an order of the Supreme Court of the State of New York entered in the office of the Clerk of the County of New York on the 8th day of August

1925, as resettled by an order of said Court dated and entered the 11th day of September 1925, James A. Beha, as the Superintendent of Insurance of the State of New York, took possession of the property of the domesticated United States Branch of the First Russian Insurance Company Established in 1827, under Section 63 of the Insurance Law of the State of New York.

That subsequently pursuant to Section 63 of the Insurance Law of the State of New York and the aforesaid orders of the Supreme Court of the State of New York, James A. Beha, as Superintendent of Insurance of the State of New York, and his successor in office, George S. Van Schaick, proceeded to liquidate the business of the domesticated United States Branch of First Russian Insurance Company Established in 1827, and as a result thereof all domestic claims have been adjudicated and allowed leaving undisposed of certain foreign claims which arose in the conduct of the business outside of the United States.

19 That on August 24, 1934, there remained in the custody of George S. Van Schaick as Superintendent of Insurance of the State of New York, as liquidator of the domesticated United States Branch of First Russian Insurance Company Established in 1827, cash securities and other assets having a value of $1,170,783.36.

5. That among the persons who have filed against the fund now in the possession of the defendant herein claims arising out of the foreign business of the First Russian Insurance Company Established in 1827, are Messrs. Campbell and Whipp, Attorneys at Law, residing in the City of New York, and Dr. M. Imchanitzky, residing in the City of New York. That the claims of these persons have been allowed in the sum of $128,010.58 and $38,403.17, respectively, and that orders were made by the Supreme Court of New York, New York County, Special Term, on February 26, 1934, copies of which are attached hereto and made a part hereof as Exhibits B and C, respectively, instructing the defendant herein to pay these respective sums to the claimants with interest thereon from June 16, 1931. That on appeal by the said George S. Van Schaick, Superintendent of Insurance, the aforesaid orders of the Supreme Court of New York, New York County, Special Term, were affirmed by orders of the Supreme Court of New York, Appellate Division, First Department, on June 15, 1934. That from the aforesaid orders of the Supreme Court of New York, Appellate Division, First Department, appeals were taken by said Superintendent of In-

20 surance to the Court of Appeals of New York and on December 4, 1934, the Court of Appeals rendered decisions without opinion affirming the aforesaid orders of the Supreme Court of New York, Appellate Division, First Department.

6. That orders on the remittiturs of the Court of Appeals may be served upon the defendant immediately or within the next few days, which will require the defendant to pay out to the claimants above described, Messrs. Campbell and Whipp and Dr. M. Imchanitzky, the

sums of $128,010.58 and $38,403.17 out of the said cash, securities, and other assets referred to in the complaint herein.

7. That if these payments be made the said cash, securities, and other assets in the hands of the defendant herein will be correspondingly diminished before an adjudication of the rights of the complainant herein to these funds can be determined by this Court.

8. That payment of the aforesaid sums of $128,010.58 and $38,403.17 out of the said cash, securities, and other assets referred to in the complaint herein will cause great, immediate, and irreparable injury and damage to the complainant herein by reason of the fact that the said cash, securities, and other assets will be diminished, by reason of the fact that the defendant herein, an officer of the State of New York, cannot be required to respond in damages to the complainant for payments made pursuant to an order of the Supreme Court of the State of New York.

21 9. That this Court in the case of United States v. Bank of New York and Trust Company and the case of United States v. President and Directors of Manhattan Company by orders to show cause dated August 22, 1934, and August 25, 1934, respectively, granted temporary restraining orders restraining and enjoining the defendants therein from paying out the funds there involved.

10. That the aforesaid restraining orders in the aforesaid cases are now in complete force and effect.

11. That this Court, on November 30, 1934, filed an opinion in the case of United States v. Bank of New York and Trust Company and in the case of United States v. President and Directors of Manhattan Company dismissing the complaints and denying motions of the complainant for injunctions pendente lite upon which opinion orders of this Court have not yet been entered.

12. That upon the presentation for settlement of orders in the aforesaid cases dismissing the complaints and denying motions of the complainant for injunctions pendente lite the complainant in the aforesaid cases will present orders continuing the aforesaid restraining orders now in force pending the determination of the complainant to take an appeal and pending the determination of such appeal.

13. That in order to enable this Court to adjudicate the rights of the complainant to the cash, securities, and other assets re-

22 referred to in the complaint, and to effectively exercise its jurisdiction and enforce its judgment it is necessary and proper that the aforesaid cash, securities and other assets remain in possession of the defendant pending the adjudication by this Court of the rights of the complainant.

14. That no application has been made to any other Court or Judge in this suit for the relief herein prayed or for similar relief.

Wherefore, deponent makes this affidavit in support of an order to show cause why the defendant should not be enjoined, and restrained permanently and pending the determination of this suit from paying out or distributing to any one other than this complain-

ant any part of the aforesaid cash, securities and other assets in the possession of the defendant.

LEON E. SPENCER.

Sworn to before me this 7th day of December 1934.

JOHN B. MERRETT,
Notary Public.

23 *Exhibit A—Certified copy of Russian text of a Decree of the Russian State on the organization of the insurance business in the Russian Republic, attached to affidavit, verified December 7, 1934*

CERTIFIED TRANSLATION OF EXHIBIT A, ATTACHED TO AFFIDAVIT, VERIFIED DECEMBER 7, 1934

Source: Collection of Decrees and Orders on National Economy (October 25, 1918—March 15, 1919) Volume Two. Published by the Supreme Soviet of National Economy of the Russian Socialist Federated Soviet Republic, Moscow, 1920. Pages 720, 721

Decree of the Soviet of People's Commissars 603. On the organization of the Insurance business in the Russian Republic.

(1) Insurance in all its forms, such as: Fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, livestock insurance, insurance against failure of crops, etc., is hereby proclaimed as a State monopoly.

NOTE.—Mutual insurance of movable goods and merchandise by the cooperative organizations is conducted on a special basis.

(2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree are
24 subject to liquidation; former rural [1] (People's Soviet) and municipal mutual insurance organizations operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Soviet Republic.

(3) For the immediate organization of the insurance business and for the liquidation of parts of insurance institutions, which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

NOTE.—The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Federated Soviet Republic.

[1] zemskie.

(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished not later than the first day of April 1919.

(5) The Commissariat of Insurance and Fire Prevention, together with all its institutions, is reorganized into the Insurance Department of the Supreme Soviet of National Economy. The
25 matter of fire prevention is transferred to the Supreme Soviet of National Economy.

(6) No Soviet properties and enterprises are subject to insurance.

(7) Life insurance with the State Savings Banks is conducted upon the former basis.

(8) The present decree comes into force on the day of its publication.

(Signed) V. ULYANOV (LENIN)
Chairman of the Soviet of People's Commissars.
V. BONCH-BRUEVICH
Administrator of Affairs of the Soviet of People's Commissars.

"IZVESTIYA of the All-Russian Central Executive Committee of Soviets", December 1, 1918, No. 263.)

[Translator's Note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

IGNATIUS JAWNEY,
Principal Translator, Department of State.

Appointed Translator, January 1928.

Russian.
Tr.IJ:MW:SS.

26 *Exhibit B attached to affidavit verified December 7, 1934*

At a Special Term, Part 1, of the Supreme Court, held in and for the County of New York, at the County Court House in the Borough of Manhattan of the City of New York, on the 26th day of February 1934

Present: Hon. Richard P. Lydon, Justice.

Co. Clerk's No. 26150—1925

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE OF New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company, established in 1827, and the interests of its policyholders, creditors, stockholders, and the public

MATTER OF PETITION OF FREDERICK B. CAMPBELL AND CAMPBELL & Whipp for an order adjudging and enforcing attorneys' lien and directing payment of claim

27 Petitioners, by notice of motion dated December 12, 1933, having moved for an order, decision and judgment (a) con-

firming the report and findings of fact of the referee herein as to so much thereof as relates to the petitioners' claim for compensation based upon express contract; (b) making conclusions of law thereon; and (c) ordering, adjudging, and decreeing that the respondent Superintendent of Insurance as liquidator of First Russian Insurance Company, Established in 1827, pay to the petitioners as copartners under the firm name of Campbell & Whipp the sum of One hundred twenty-eight thousand ten and 58/100 dollars ($128,010.58), together with interest thereon from June 16, 1931, to date of payment;

And Mr. Justice Glennon, before whom the matter was pending, having referred further proceedings to this court, and the matter having come on to be heard on January 10, 1934, to which date the matter had previously been adjourned by the court;

And after hearing Frederick B. Campbell, Esq., on behalf of the petitioners in support of the motion, and after hearing in opposition thereto John M. Downes, Esq., of counsel for respondent, the Superintendent of Insurance as liquidator of the above-named Company, and Samson Selig, Esq., G. Frank Dougherty, Esq., and Borris M. Komar, Esq., of counsel, respectively, for respondent creditors; and the Court, after due deliberation, having filed its opinion;

28 Now, therefore, upon reading the following papers heretofore filed herein, namely, the notice of motion herein dated December 12, 1933, and proof of service thereof; the petition herein, verified February 25, 1932; the answer and supplementary answer of the Superintendent of Insurance as liquidator verified, respectively, March 4, 1932, and March 10, 1932; the answering affidavits of Jacob Jolles, verified March 4, 1932, of Borris M. Komar, verified March 3, 1932, of H. H. Nordlinger, verified March 2, 1932, of James A. Tillman, verified March 2, 1932, of Isador Witkind, verified March 3, 1932; the order of Special Term, Part 1, of this court (Mr. Justice Glennon), dated July 20, 1932, and entered on August 4, 1932, referring the matter to Hyman Bushel, Esq., to take testimony and report as to the facts, in aid of the decision of the motion; and upon reading so much as relates to the petitioners' claim for compensation based upon express contract, of the report of said referee dated October 10, 1933, and filed with the Clerk of Special Term, Part 1, on October 11, 1933, together with the referee's findings of fact and the testimony and exhibits filed with said report and made a part thereof, which report, findings, and exhibits are filed herein; and upon reading and filing the stipulation dated December 11, 1933.

And on motion of the petitioners, it is hereby

Ordered, adjudged, and decreed that the Superintendent of Insurance as liquidator of First Russian Insurance Company, Established in 1827, pay to the petitioners, Frederick B.

29 Campbell and Paul C. Whipp as copartners under the firm

name of Campbell & Whipp, the sum of One Hundred twenty-eight thousand ten and 58/100 dollars ($128,010.58), together with interest thereon from June 16, 1931, to date of payment.

Enter:

R. P. L.,
J. S. C.

30 *Exhibit C attached to affidavit verified December 7, 1934*

At a Special Term, Part 1, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, Borough of Manhattan, City of New York, on the 26th day of February, 1934

Present: Hon. Richard P. Lydon, Justice.

County Clerk's No. 26150, 1925

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE of New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company, Established in 1827, and the interests of its policyholders, creditors, stockholders, and the public.

MATTER OF PETITION OF MICHAEL IMCHANITZKY, FOR AN ORDER Directing payment of claim under assignment

Michael Imchanitzky, having duly filed with this court a
31 petition verified February 26th, 1932, praying for an order authorizing and directing the Superintendent of Insurance of the State of New York, as Liquidator of the First Russian Insurance Company, Established in 1827, to pay to said petitioner the sum of $38,702.06, under and in pursuance of the assignment thereof referred to in the said petition; and by notice of motion dated February 26th, 1932, directed to all the parties appearing herein, the matter having been brought before Hon. Edward J. Glennon, one of the Justices of this court, holding Special Term, Part 1, of this court, on March 5th, 1932, and Mr. Justice Glennon, having on July 29th, 1932, made an order herein referring this matter to Hyman Bushel, Esq., as Referee, to take testimony and to report as to the facts, and that pending such report, decision on the motion be held in abeyance, and the said Hyman Bushel, Esq., Referee, having heretofore and on or about October 10th, 1933, duly filed his report in pursuance of the order last above referred to, which said report bears date October 10th, 1933; and Mr. Justice Glennon having been designated to sit in the Appellate Division of this court,

said motion was duly referred to the Justice presiding in Special Term Part I of this court, and the said motion having duly come on to be heard before me on the 10th day of January 1934.

Now, upon reading the order of Mr. Justice Glennon, made and entered in this proceeding on July 29th, 1932, and the papers upon which the said order was entered (to wit: the said petition of
32 Michael Imchanitzky, verified February 26th, 1932, the affidavit of Frederick B. Campbell, sworn to February 26th, 1932, the said notice of motion dated February 26th, 1932, with due proof of service thereof, upon all parties appearing herein, the answer of the Superintendent of Insurance of the State of New York, as Liquidator, verified March 4th, 1932, and the supplemental answer of the said Superintendent of Insurance of the State of New York, as said Liquidator, verified March 10th, 1932, the affidavit of Borris M. Komar, sworn to March 3rd, 1932, the affidavit of Jacob Jolles, sworn to March 4th, 1932, the affidavit of Isidore Witkind, sworn to March 3rd, 1932, the affidavit of James A. Tillman, sworn to March 3rd, 1932, and the affidavit of H. H. Nordlinger, sworn to March 2nd, 1932) the report of Hon. Hyman Bushel, Referee, dated October 10th, 1933, together with the said Referee's findings of fact and the testimony and exhibits filed with said report and made a part thereof, and upon reading and filing the exceptions to the said Referee's report, dated January 9th, 1934, filed by John M. Downes, Esq., attorney for the Superintendent of Insurance, as Liquidator of the First Russian Insurance Company, Established in 1827, and after hearing George Frankenthaler, Esq. (Alexander Bicks, Esq. of counsel) attorney for the petitioner in support of said motion, and John M. Downes, Esq., attorney for the Superintendent of Insurance, Borris M. Komar, Esq., attorney for Andrew Ditmar, et al., Samson Selig, Esq., attorney for Kaplan, et al., Engelhard Pollak, Pitcher & Stern, Esqs. (G. Frank Dougherty, Esq. of counsel),
33 attorneys for Dougherty, et al., in opposition to said motion, and due deliberation having been had thereon, and the opinion of the court having been filed, it is hereby

Ordered, adjudged, and decreed, that the prayer of the petitioner herein, contained in his said petition verified February 26th, 1932, be and the same hereby is in all respects granted, and it is hereby further

Ordered, adjudged, and decreed that the Superintendent of Insurance, as Liquidator of the First Russian Insurance Company, Established in 1827, be and he hereby is authorized and directed to pay to the petitioner herein, the sum of $38,403.17, with interest thereon from June 16th, 1931, to the date of payment.

Enter:

R. P. L.,
J. S. C.

34 In United States District Court, Southern District of New York

[Title omitted.]

Defendant's order to show cause to dismiss complaint

On the annexed affidavit of Alfred L. Green, sworn to on the 8th day of December 1934, and upon the bill of complaint herein and the bill of particulars thereof,

It is ordered that the complainant be and appear before this Court at a stated term thereof for the hearing of motions, to be held on the 11th day of December 1934, in Room 235 in the Old Post Office Building, in the City, County, and Southern District of New York, Borough of Manhattan, at the hour of 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, then and there to show cause, if any it has, why the complaint

35 herein should not be dismissed, upon the ground that such complaint fails to state facts sufficient to constitute a cause of action, and why the defendant herein should not have such other and further relief to which he may be entitled.

Let service hereof be made upon the complainant by service upon the United States Attorney, or an Assistant United States Attorney, in and for the Southern District of New York, of a copy, which need not be certified, on or before December 10, 1934.

Dated, New York, N. Y., December 8th, 1934.

HENRY W. GODDARD,
U. S. D. J.

36 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit attached to defendant's order to show cause

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, ss.:

Alfred L. Green, being duly sworn, deposes and says that he is an attorney at law associated with John M. Downes, Esq., attorney for the Superintendent of Insurance of the State of New York, as liquidator of the above-named company, and that he is familiar with all the proceedings had and actions taken in the liquidation of the First Russian Insurance Company, Established in 1827.

In and by the bill of complaint herein, the complainant

37 claims title to certain funds in the possession and custody of the defendant as Superintendent of Insurance of the State of New York, as liquidator of the domesticated United States Branch of the First Russian Insurance Company, Established in 1827. Such claim is made under certain alleged assignments from the Russian

State, dated on or about November 16, 1933, as referred to in paragraph numbered "7" of the bill of complaint herein.

There is now pending before this Court a motion brought on by an order to show cause, dated December 7, 1934, returnable on December 11, 1934. Said motion is by the complainant for an injunction enjoining and restraining the defendant from paying out or distributing to anyone other than said complainant any part of the funds in the hands of this defendant.

This Court recently had before it the cases of United States v. Bank of New York and Trust Company and United States v. President and Directors of Manhattan Company. Both of said cases were almost identically the same as the instant action and are based upon the same claim of title by the complainant. In said actions motions by the defendants to discuss the complaints and motions by the complainant for injunctions were heard at the same time, so that the entire matter was at once brought before the Court for its determination.

It is desirable, therefore, that this Court, on the return date of the complainant's motion for an injunction, should also have before it the defendant's motion to dismiss the complaint so that
38 the Court may decide the entire controversy, and avoid the necessity of motions being made at a later date, which motions would bring up the same questions of law.

The reason why the within order to show cause is sought is because the complainant's motion for an injunction is returnable on December 11, 1934, and there is not sufficient time to the defendant to bring on a motion to dismiss the complaint by the usual five days' notice.

No application has been made to any Court or Judge for the relief prayed for herein, or for any similar relief.

ALFRED L. GREEN.

Sworn to before me, this 8th day of December, 1934.

ELIZABETH SAWYER,

Notary Public, Kings County, N. Y. Kings County Clerk's No. 641. N. Y. County Clerk's No. 1882. Term expires March 30, 1936.

39 In United States District Court, Southern District of New York

[Title omitted.]

Bill of particulars

The complainant, in response to the defendant's notice of motion for an order requiring the complainant to serve upon defendant's attorney on or before December 10, 1934, the bill of particulars of the allegations of the bill of complaint, hereby states:

1. That the government or regimé in or of Russia, intended to be referred to by the term "State of Russia" in paragraph III of the complaint and by the term "Russian State" in paragraphs IV and VII of the complaint, is the government which has been recognized

by the United States, by its political departments as having been sovereign in Russia since 1917.

2. That the decrees of the Russian State referred to in
40 paragraph IV of the complaint are decrees published April 20, 1918, December 1, 1918, March 7, 1919, and March 5, 1921, copies and translations of which are hereto annexed and any other decrees which the complainant may offer as part of its proof in the event of a trial, upon giving reasonable notice to the solicitor for the defendant.

3. That the assignments referred to in paragraphs VII of the complaint are written assignments, photostatic copies of certified copies of which are annexed hereto, described as follows:

A. A written assignment by the State of Russia to the United States, dated August 25, 1933, signed by Serge Ughet as Russian Financial Attaché and Custodian of the property of the Russian Government in the United States, acting for and on behalf of the State of Russia.

B. An exchange of letters, dated November 16, 1933, between the President of the United States and Maxim Litvinoff, People's Commis'ar for Foreign Affairs, Union of Soviet Socialist Republics.

Dated. New York, N. Y., December 10, 1934.

MARTIN CONBOY,

United States Attorney, Southern District of New York, Attorney for Complainant, Office & P. O. Address, U. S. Courts & P. O. Bldg., Borough of Manhattan, New York City.

41 *Exhibit A—Certified copies of Russian text of decrees of the Russian State published April 20, 1918, December 1, 1918, March 7, 1919, and March 5, 1921, attached to bill of particulars*

CERTIFIED TRANSLATION OF RUSSIAN DECREE PUBLISHED APRIL 20, 1918

Source: Sobranie Uzakonenii I Pasporyazhenii Rabochego I Krestyanskogo Pravitelstva (Collection of Laws and Orders of the Worker's and Peasant's Government), 1917–1918, Nos. 1–80, Moscow, 1919

Translation

Decree of the Soviet of People's Commissars

420. Regarding the registration of stock certificates, bonds, and other interest-bearing securities.

(1) In pursuance of the decree of December 29, 1917, on the discontinuance of payments on coupons and dividends (Sobranie Uzakonenii I Rasporyazhenii Rabochego I Krestyanskogo Pravitelstva—Collection of Laws and Orders of the Worker's and Peasant's Government—No. 13, Article 185), the system of anonymous stock certificates and all kinds of other interest-bearing securities is abol-

ished and henceforth only name-bearing interest-bearing securities shall be valid.

NOTE.—Those state interest-bearing securities to which, by
42 special resolution of the Government, circulation has been accorded on a par with paper money, are not subject to the provisions of the present clause.

(2) In accordance therewith, there shall be introduced an obligatory registration of stock certificates, bonds, and all kinds of other interest-bearing securities, Russian and foreign, belonging not only to citizens of the Russian Soviet Republic, but also to foreign citizens residing in its boundaries.

(3) Each owner or holder of securities indicated in clause 1 must present them for registration in one of the offices or branches of the People's (State) Bank of the Russian Soviet Republic.

(4) On the securities presented in accordance with the preceding clause there shall be denoted by the State Bank, under its seal, the Christian name, patroynmic, surname, and address of their owners, which shall likewise be entered in the register of negotiable instruments.

(5) All branches of the People's (State) Bank and the State Savings Bank, all state and public institutions, as well as nonnationalized credit institutions, in which stock certificates and interest-bearing securities are kept for safe-keeping, for management, in pledge, as security, etc., must effect the registration of securities there located, recognizing as the owners thereof those physical and juridical persons in whose behalf and in whose name they are
43 entered. All this information relating to registration must be centered in the local branches of the People's (State) Bank.

NOTE.—Interest-bearing securities, found in safe deposit boxes, are considered as the property of the renters of the safe deposit boxes, if, in the safe deposit box itself, there is not found evidence to the contrary.

(6) The prohibition of the disposition of stock certificates, bonds, and other interest-bearing securities, set forth in the decree of December 29, 1917, shall retain its validity until the issuance of a law concerning the introduction of a system permitting the disposition of stock certificates and other interest-bearing securities.

Only owners of stock certificates and other interest-bearing securities, who have correctly and on time registered them, shall have a right to compensation, in the event of the nationalization of enterprises, in those amounts and on those conditions which shall be determined by the law regarding nationalization.

Likewise, only such owners of stock certificates shall have a right to a dividend after the payment thereof, suspended by the law of December 29, 1917, shall have been authorized.

(7) The presentation of stock certificates and other interest-bearing securities, on hand, must be preceded by the filing of applications. The form of these applications, the date of their filing, and further regulations, pertaining to the presentation of stock

44 certificates and to their registration, shall be determined by the People's Commissariat for Finance and shall be made known to the public.

(8) All stock certificates with respect to which the applications, indicated in clause 7, will not have been filed in time, shall be subject to become, without recompense, state property.

NOTE.—Owners and holders of stock certificates who have not carried out the instructions of the present decree shall be subject to imprisonment for a term of not less than one year.

Those guilty of performing fictitious transactions for the purpose of evading this decree shall be punished by imprisonment for a term of not less than two years.

(9) Annulled securities and stock certificates of confiscated enterprises are also subject to registration in order to guaranty the just interests of the holders.

(10) The registration of Russian interest-bearing securities, bonds, and stock certificates, private, public, and state, which are abroad, shall be effected regardless of whether they belong to Russian or foreign citizens; and for their registration it shall be obligatory to present them in the original to persons or institutions who shall be empowered by the appropriate diplomatic representatives of Russia abroad to keep state registers in the corresponding appropriate states and during periods which shall be established by the aforesaid diplomatic representatives.

45 Signed: President of the Soviet of People's Commissars, Vl. Ulyanov (Lenin). For the People's Commissar of Finance, I. Gukovski. President of the Supreme Soviet of National Economy, A. I. Rykov. In charge of the affairs of the Soviet of People's Commissars, Vl. Bonch-Bruevich. April 18/5, 1918.

Published in Izvestiya of the All-Russian Central Executive Committee of Soviets, April 20/7, 1918, No. 78.

Translator's Note: I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

IGNATIUS JAWNEY,
Principal Translator, Department of State.

Appointed Translator, January 1928.
Tr: IJ: MA: SS 9/27.

46 *Certified translation of Russian decree published December 1, 1918*

Source: Collection of Decrees and Orders on National Economy (October 25, 1918–March 15, 1919) Volume Two—Published by the Supreme Soviet of National Economy of the Russian Socialist Federated Soviet Republic, Moscow, 1920. Pages 720, 721

Decree of the Soviet of People's Commissars

603. On the organization of the insurance business in the Russian Republic.

(1) Insurance in all its forms, such as fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, live-stock insurance, insurance against failure of crops, etc., is hereby proclaimed as a State monopoly.

NOTE.—Mutual insurance of movable goods and merchandise by the cooperative organizations is conducted on a special basis.

(2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree are subject to liquidation; former rural [1] (People's Soviet) and municipal mutual insurance organizataions operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Soviet Republic.

47 (3) For the immediate organization of the insurance business and for the liquidation of parts of insurance institutions, which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

NOTE.—The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Federated Soviet Republic.

(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished, not later than the first day of April 1919.

(5) The Commissariat of Insurance and Fire Prevention, together with all its institutions, is reorganized into the Insurance Department of the Supreme Soviet of National Economy. The matter of fire prevention is transferred to the Supreme Soviet of National Economy.

(6) No Soviet properties and enterprises are subject to insurance.

48 (7) Life insurance with the State Savings Banks is conducted upon the former basis.

(8) The present decree comes into force on the day of its publication.

(Signed) V. ULYANOV (LENIN),
Chairman of the Soviet of People's Commissars.

V. BONCH-BRUEVICH,
Administrator of Affairs of the Soviet of People's Commissars.

("Izvestiya of the All-Russian Central Executive Committee of Soviets", December 1, 1918, No. 263.)

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[1] zemskie.

[Translator's Note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

Ignatius Jawney
IGNATIUS JAWNEY,
Principal Translator, Department of State.

Appointed Translator, January 1928.

Russian.
Tr. IJ : MW : SS.

49 *Certified translation of Russian decree published March 7, 1919*

Translation

Source: Sobranie Uzakonenii i Rasporyazhenii Rabochego i Krestyanskogo Pravitelstva (Collection of Laws and Orders of the Worker's and Peasant's Government), 1919, Pages 133–134

Decree of the Soviet of People's Commissars

108. On the liquidation of obligations of state enterprises.

In view of the fact that all state (nationalized, sequestrated, former governmental, etc.) enterprises, on the basis of the decree of the Soviet of People's Commissars regarding the financing of enterprises (Collection of Laws, 1919, No. 10–11, Art. 107), beginning with March 1 of this year, are being supplied with necessary funds exclusively through separate budget financing, the Soviet of People's Commissars decrees:

(1) Stock-certificates and shares of joint stock companies and partnerships, whose enterprises have been either nationalized or sequestrated, are annulled even though such enterprises have not yet been placed under the direction of governmental administrations and have remained in the use of former owners without payment of rent.

(2) State enterprises are freed from the payment of all
50 debts to private persons and enterprises which have arisen prior to the nationalization of these enterprises, including payments on bond loans, with the exception only of wages due to their workers and employees.

NOTE.—Former governmental plants which, as the result of the October revolution, have been placed at the disposition of the Worker's-Peasant's Government, are freed from the payment of those debts only which have arisen before October 25, 1917.

(3) The debts of State enterprises due other State enterprises and institutions, the People's Bank of the R. S. F. S. R. and all former private credit institutions which have amalgamated with it, and also all kinds of State and local taxes in arrears, are annulled and are not subject to collection.

(4) Cash and capital belonging to State enterprises, in credit institutions, shall be taken from their administration and shall be transferred to the income of the Treasury, with the exception of sums paid out to an enterprise under budget estimates for the first half year of 1919, and with the exception of construction credits for 1918.

(5) Obligations of third persons with respect to State enterprises retain their validity, and the appropriate head office, center, or section of the Supreme Soviet of National Economy, shall be given the right to repudiate agreements concluded by a former owner
51 of an enterprise before its nationalization or before its actual transfer to the direction of a governmental administration.

(6) A detailed instruction concerning the putting into effect of the present decree shall be completed within a week's time by the Supreme Soviet of National Economy together with the People's Commissariats of State Control and of Finance.

Signed:

V. Ulyanov (Lenin),
President of the Soviet of People's Commissars.

V. Bonch-Bruevich,
In charge of the Affairs of the Soviet of People's Commissars.

L. Fotieva,
Secretary of the Soviet of People's Commissars.

March 4, 1919.

Published in Izvestiya of the Central Executive Committee, March 7, 1919.. No. 52.

[Translator's Note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

Ignatius Jawney,
Ignatius Jawney,
Principal Translator, Department of State.

Appointed Translator, January 1928.

Tr: IJ: AT: SS.

52 *Certified translation of Russian decree published March 5, 1921*

Source: Sobranie Uzakonenii i Rasporyazhenii Rabochego i Krestyanskogo Pravitelstva (Collection of Decrees and Orders of the Worker's and Peasant's Government). Publication of the People's Commissariat for Justice, March 18, 1921, No. 18, 1921, No. 18, Article 111, Page 106.

Translation

111. Regarding the confiscation of all movable property of citizens who have fled beyond the borders of the Republic or who have been in hiding up to the present time.

The Soviet of People's Commissars has resolved the following as supplementary to its decree concerning property without an owner (Collection of Decrees and Orders, 1920, No. 87, Article 442):

1. All movable property, regardless of what it consisted of or where it was found, of citizens who have fled beyond the borders of the Republic or of citizens who have been in hiding up to the present time, is declared the property of the R. S. F. S. R.

2. Of said property all articles of art or antiquity which possess a particular artistic or historic value shall be given over by order of the People's Commissariat for Public Instruction to museums, universities, or other educational institutions; all the remaining property of such citizens shall be converted into a merchandise fund of the Republic, and shall be placed at the disposition of the
53 People's Commissariat for Foreign Trade and other People's Commissariats in accordance with their respective jurisdictions.

3. In execution of the present resolution a detailed instruction shall be issued to the People's Commissariats for Public Instruction and for Foreign Trade.

(Signed:)

V. ULYANOV (LENIN),
President of the Soviet of People's Commissars.

N. GORBUNOV,
Administrator of Affairs of the Soviet of People's Commissars.

L. FOTIEVA,
Secretary of the Soviet of People's Commissars.

November 19, 1920.

Published in Izvestiya of the All Russian Central Executive Committee of Soviets, No. 49, March 5, 1921.

[Translator's note.] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

Ignatius Jawney
IGNATIUS JAWNEY,
Principal Translator, Department of State.

Appointed Translator, January 1928.
Russian.
Tr. IJ.

54 *Exhibit B—Certified copy of assignment, dated August 25, 1933, attached to bill of particulars*

Know all men by these presents that I, the undersigned, Serge Ughet, as Russian Financial Attache and Custodian of the Property of the Russian Government in the United States, acting for and on behalf of the State of Russia, for and in consideration of good and valuable considerations by the United States of America to the State of Russia paid, the receipt of which is hereby acknowledged, have assigned, transferred, set over and delivered and by these presents

do assign, transfer, set over and deliver unto the United States of America, its successors and assigns, to its and their own proper use and benefit forever, all property, of whatsoever nature and description, in the United States belonging to the State of Russia, together with all claims and demands of every nature and description, whether legal or equitable, existing in favor of the State of Russia in the United States, or against any person, firm, or corporation in the United States, or arising out of any contract or agreement or transaction in the United States or otherwise, including therein among others the following property and claims:

(1) Claim for approximately $4,976,722.78 with interest for a balance of the Russian Government with the Guaranty Trust Company of New York.

(2) Claim for approximately $15,000.00 against the Guaranty Trust Company of New York arising out of a contract with the Morton Truck and Tractor Company.

55 (3) Claim for approximately $46,584.18 balance on deposit with the New York Trust Company on account of a bond issue of the Vladikavkas Railway Company.

(4) Claim for approximately $11,680.00 against the said New York Trust Company on account of a balance of a payment made by the Russian Financial Attache on or about September 10, 1918, in connection with the same bonds.

(5) Claim for approximately $140,000.00 against the National City Bank of New York on account of a payment made to the said bank regarding certain shoes ordered for working men and employees of the Vladikavkas Railway Company.

(6) Claim for approximately $1,050,000.00 with interest against the Curtiss Aeroplane & Motor Company.

(7) Claim for approximately $384,118.07 with interest for moneys due from the Canadian Pacific Railway Company under contracts with the Russian Government.

(8) Claim for approximately $1,412,532.35 with interest on account of the amounts due by the United States Shipping Board for the requisition of Hulls Nos. 6 and 7 of the Russian Volunteer Fleet, action in connection with which is now pending in the United States Court of Claims No. 69 A.

56 (9) Claim for the sum of approximately $218,750.00 originally deposited with the Guaranty Trust Company as escrow money on Hull No. 6 under the contract for the purchase of said hull by the said Russian Volunteer Fleet.

(10) Claim for the sum of approximately $23,643.75 on account of a balance due by the United States Shipping Board in connection with the charter of certain steamers of the said Russian Volunteer Fleet.

The foregoing list of claims is not intended to be exclusive. It is the intention of this assignment to transfer to the United States of America all property, rights, and claims having a situs in the

United States formerly belonging to either the Imperial Russian Government or the Provisional Russian Government.

Excluding from this assignment, however, the right, title, and interest of the said State of Russia in and to the claim, demand or cause of action involved in the pending suit in equity in the United States District Court for the Southern District of New York, No. E 46-6, entitled "State of Russia, plaintiff, against Bankers Trust Company and National City Bank of New York, defendants."

IN WITNESS WHEREOF, the said Serge Ughet as Russian Financial Attache and Custodian of the property of the Russian Government in the United States, acting for and on behalf of the State of
57 Russia, has hereunto set his hand and seal this 25th day of August 1933.

(Signed) SERGE UGHET,
As Russian Financial Attache and Custodian of the property of the Russian Government in the United States, acting for and on behalf of the State of Russia.

Seal: Financial Attache to the Russian Embassy in Washington.

Exhibit C—Certified copy of exchange of letters, dated November 16, 1933, attached to bill of particulars

WASHINGTON, *November 16, 1933.*

MY DEAR MR. PRESIDENT: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of
58 Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russia Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of the Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its
59 nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,
Very sincerely yours,

MAXIM M. LITVINOFF,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

Mr. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

THE WHITE HOUSE,
Washington, November 16, 1933.

MY DEAR MR. LITVINOV: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any
60 decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or
61 its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or

that may be found to be due; the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

Mr. MAXIM M. LITVINOV,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

62 In United States District Court, Southern District of New York

[Title omitted.]

Affidavit of John M. Downes, in opposition to motion by complainant for injunction pendente lite

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

John M. Downes, being duly sworn, deposes and says:

1. That he is the attorney for the defendant George S. Van Schaick, Superintendent of Insurance of the State of New York, as liquidator of the First Russian Insurance Company Established in 1827, and that he is familiar with all of the affairs in the United States of the said First Russian Insurance Company Established in 1827.

63 2. That in or about the year 1907 the said First Russian Insurance Company Established in 1827 was admitted into and authorized to transact in the State of New York and in other states of the United States the business of fire insurance. From 1907 until shortly prior to 1925 the said Company continued to transact such business of fire insurance in the State of New York and in other States of the United States under annual license from the Superintendent of Insurance of the State of New York and the Insurance Departments of other States. Pursuant to the law of the State of New York (Insurance Law, Section 27), the funds or capital of the said Company in the United States as used in the transaction of its United States business were held by the Insurance Departments of New York and Ohio and by the Bankers Trust Company of New York as the Company's substituted trustee, the funds so held being held under the statutory trust for the Company's policyholders and creditors in the United States, and subject thereto for the Company itself.

3. That by order of the Supreme Court of the State of New York, New York County, dated August 8, 1925, and resettled September 11, 1925, a copy of which is hereto annexed and made a part hereof marked Exhibit "A", the Superintendent of Insurance of the State of New York was ordered and directed forthwith to take possession

of the property and conserve the assets in the United States of America of the said First Russian Insurance Company Established in 1827 and retain possession and conserve such assets until
64 the further order of the Supreme Court. Thereafter, under the orders and directions of the said New York Supreme Court, the Superintendent of Insurance of the State of New York, as liquidator of the said First Russian Insurance Company Established in 1827, entered into possession of the United States assets of the said Company and investigated, ascertained, fixed and determined the claims of policyholders and creditors in the United States of the said First Russian Insurance Company Established in 1827, and paid all such claims which were found to be valid. There then remained a substantial surplus of funds belonging to the said First Russian Insurance Company Established in 1827 concerning the disposition of which there ensued a long litigation in the Courts of the State of New York. Eventually, the New York Court of Appeals by its decision, reported in 255 N. Y. 415, directed that such surplus funds remaining after payment of domestic policyholders and creditors of said First Russian Insurance Company Established in 1827 should be applied by the Superintendent of Insurance to the liquidation and payment of all valid claims against the said First Russian Insurance Company arising from business transacted by the said Company outside of the United States, and that any surplus then remaining of the funds of the said First Russian Insurance Company should be made available for foreign attaching creditors, and that any further surplus then remaining should be paid and delivered to the surviving directors of the said First Russian Insurance Company Established in 1827. On June 16, 1931, the New York
65 Supreme Court made an order upon the remittitur of the New York Court of Appeals, a copy of which is hereunto attached and made a part hereof marked Exhibit "B", which said order made the order and judgment of the Court of Appeals the order and judgment of the New York Supreme Court.

4. That the Superintendent of Insurance of the State of New York thereafter pursuant to the said decision of the New York Court of Appeals, as reported in 255 N. Y. 415, and pursuant to the said order upon the remittitur of the New York Supreme Court, proceeded to determine the claims of foreign creditors of the said First Russian Insurance Company Established in 1827 as filed with the said Superintendent of Insurance, as liquidator as aforesaid. Certain of said foreign claims have been allowed by the said Superintendent of Insurance, as liquidator, and certain payments have been made on account of such claims as allowed. Other foreign claims against the said First Russian Insurance Company Established in 1827 have been disallowed by the Superintendent of Insurance and such disallowed claims are now being litigated before Honorable Maldwin Fertig, as Referee appointed by the New York Supreme Court.

5. That during all the proceedings in the State Courts with reference to the affairs of the said First Russian Insurance Company Established in 1827, and prior to the institution of any of said proceedings, the said First Russian Insurance Company Established in 1827 has been represented in the United States by Messrs.
66 Campbell & Whipp, as its United States attorneys and counsel, and by Dr. Michael Imchanitzky, as its Russian counsel. Subsequent to the said decision of the New York Court of Appeals, as reported in 255 N. Y. 415, the said firm of Campbell & Whipp, and the said Michael Imchanitzky respectively filed claims with the Superintendent of Insurance, as liquidator of the said First Russian Insurance Company Established in 1827 for their services rendered to and on behalf of the said Company, such services being based upon certain written contracts of retainer and assignments of so much of the United States assets of the said Company as would cover their agreed fees respectively executed in May 1923, and further in the case of the said firm of Campbell & Whipp upon a claim of an attorney's lien to the extent of their agreed fees upon the funds in the United States of the said First Russian Insurance Company, the said firm, even prior to the liquidation order having brought suits on behalf of said First Russian Company to recover its surplus funds remaining after payment of United States policyholders and creditors. Pending final decision upon said claims, the New York Supreme Court by its order made and entered May 13, 1932, a copy of which order is hereunto attached and made a part hereof marked Exhibit "C", among other things

"Ordered, adjudged and decreed * * * that should the applications of Michael Imchanitzky, Esq., and Messrs Campbell &
67 Whipp, now pending undecided in this Court, result ultimately in decisions granting in whole or in part the respective reliefs prayed for in said applications, then and in such case or cases the said balance of surplus assets, amounting to $1,149,630.96, shall be subject to deduction therefrom of any amount or amounts which may be hereafter awarded or directed to be paid as a result of said applications."

Thereafter, the New York Supreme Court by orders dated respectively February 26, 1934, copies of which are attached as Exhibits to the moving affidavit herein of Leon E. Spencer, sworn to December 7, 1934, ordered and directed that the claims of the said Campbell & Whipp and the said Michael Imchanitzky be allowed and paid. The said orders of the New York Supreme Court were thereafter affirmed by orders of the Appellate Division, First Department, dated June 15, 1934. The said orders of the Appellate Division were thereafter affirmed on December 5, 1934 by the New York Court of Appeals, and on December 7, 1934 the orders and judgments of affirmance of the New York Court of Appeals were respectively made the orders and judgments of the New York Supreme Court. Attached hereto and marked Exhibits "D" and "E" respectively

are copies of the said orders of the New York Supreme Court entered upon the respective remittiturs from the New York Court of Appeals. The order and judgment in favor of Messrs. Campbell & Whipp directs payment by the New York Superintendent of Insurance, as liquidator of the said First Russian Insurance Com-
68 pany Established in 1827 of the sum of $128,010.58 together with interest thereon from June 16, 1931 to date of payment. The order and judgment in favor of Michael Imchanitzky directs payment by the New York Superintendent of Insurance, as liquidator of the said First Russian Insurance Company Established in 1827, of the sum of $38,403.17 together with interest thereon from June 16, 1931 to the date of payment.

6. The defendant respectfully submits that the motion for an injunction pendente lite should be denied:

(a) For the reason that the complaint fails to state a cause of action, as has been decided in a similar case by U. S. District Judge Coxe.

(b) For the reason that even assuming that it could be held that the complaint states a cause of action the judgments in favor of the said Campbell & Whipp and Michael Imchanitzky respectively would have to be paid as they are based on assignments and an attorneys' lien accruing long prior to the recognition of Soviet Russia by the United States and the alleged assignment by Commissioner Litvinoff to the United States. In the event that any injunction pendente lite be granted, it should expressly except the payment of the said judgment claims of Campbell & Whipp and Michael Imchanitzky.

(c) For the reason that the said judgments in favor of
69 Campbell & Whipp and Michael Imchanitzky respectively are carrying interest at the rate of six per cent (6%) until the date of payment, and such interest charges are unnecessarily depleting the estate in the custody of the Superintendent of Insurance.

JOHN M. DOWNES.

Sworn to before me this 10 day of December 1934.

ELIZABETH SAWYER,
Notary Public, Kings County, N. Y. Kings County Clerk's No. 641. N. Y. County Clerk's No. 1882. Term expires March 30, 1936.

70 *Exhibit A, attached to affidavit of John M. Downes*

At a Special Term of the Supreme Court of the State of New York, Part I thereof, held in and for the County of New York, in the Borough of Manhattan, City, County, and State of New York, which is in the First Judicial District of the Supreme Court of the State of New York, on the 11th day of September 1925.

Present: Hon. Phoenix Ingraham, Justice.

County Clerk's No. 26150–1925

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE of New York by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company Established in 1827, and the interests of its policy holders, creditors, stockholders, and the public

71 A motion having been made to resettle the order herein dated and entered August 8, 1925, and the said motion having duly come on to be heard, now on reading and filing the notice of motion for resettlement dated August 18th, 1925, and upon reading the following enumerated papers heretofore filed herein, namely, the order dated and entered August 8, 1925, the order to show cause dated July 14, 1925, signed by Mr. Justice John L. Walsh, the petition of James A. Beha, Superintendent of Insurance, verified July 13, 1925, and the sworn report of Isaac Siegel, an official examiner of the Insurance Department of the State of New York dated and verified July 13, 1925, annexed to said petition, in support of said motion,

Now on motion of Campbell & Whipp, attorneys for respondent First Russian Insurance Company Established in 1827, it is

Ordered, that said order of August 8, 1925, be and the same is hereby resettled nunc pro tunc as of August 8, 1925, so as to read as follows:

At a Special Term of the Supreme Court of the State of New York, Part I thereof, held in and for the County of New York, in the Borough of Manhattan, City, County, and State of New York, which is in the First Judicial District of the Supreme Court of the State of New York, on the 8th day of August 1925.

72 Present: Hon. Phoenix Ingraham, Justice.

County Clerk's No. 26150–1925

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE OF New York by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company Established in 1827, and the interests of its policy holders, creditors, stockholders, and the public.

Upon reading the petition of James A. Beha, Superintendent of Insurance of the State of New York, duly verified the 13th day of July 1925, and the sworn report of Isaac Siegel, an official examiner of the Insurance Department of the State of New York, dated and verified July 13, 1925, annexed to and made a part of the aforesaid

petition of James A. Beha, said report of Isaac Siegel being marked Exhibit A, and upon the papers and exhibits annexed to said
73 report Exhibit A, and the order to show cause thereupon granted by Mr. Justice John L. Walsh, one of the Justices of the Supreme Court of the State of New York in and for the First Judicial District thereof; dated the 14th day of July 1925, and due proof of the service of said order to show cause and the papers upon which it was granted having been duly made on the said First Russian Insurance Company Established in 1827, above-named, as more fully shown by the affidavit of Francis P. Ward, duly verified the 14th day of July 1925, and upon the appearance of said First Russian Insurance Company Established in 1827 in the above entitled proceeding by its attorneys Messrs. Campbell & Whipp, and upon the affidavit of Paul E. Rasor, verified the 23rd day of July 1925, and the affidavit of Frederick B. Campbell, verified the 23rd day of July 1925, and the exhibits thereto annexed respectively;

And the motion herein on the aforesaid order to show cause having duly and regularly come on before this court for hearing on the 17th day of July 1925, and said First Russian Insurance Company Established in 1827 having appeared by its attorneys Messrs. Campbell & Whipp and having requested an adjournment and the motion having been adjourned until the 29th day of July 1925, at three o'clock in the afternoon of said day, and the court, on its own motion, having adjourned the motion until the 30th day of July 1925, and after hearing Albert Ottinger, Attorney General of the State of New York by Joseph C. H. Flynn, Deputy Attorney
74 General, and Clarence C. Fowler, Special Deputy Attorney General, of counsel in support of said motion, and the First Russian Insurance Company Established in 1827 having appeared by its attorneys Messrs. Campbell & Whipp in opposition to said motion, and Messrs. Rumsey & Morgan having appeared on behalf of Fred S. James & Co., a corporation, an alleged creditor, and the court, on its own motion, having adjourned the proceeding until August 4, 1925, and on the latter day after a full hearing and due deliberation having been had thereon;

And it appearing to the satisfaction of the court that the relief demanded by the Superintendent of Insurance should be granted as herein provided, it is hereby

Ordered, that the Superintendent of Insurance of the State of New York and his successors in office be and he is and they are hereby directed forthwith to take possession of the property and conserve the assets in the United States of America of the First Russian Insurance Company Established in 1827 and retain possession and conserve such assets until the further order of this court; and it is hereby further

Ordered, that the Superintendent of Insurance and his successors in office be and he is and they are hereby directed to ascertain, fix, and determine the lawful and valid claims, debts and demands of

the policyholders and creditors in the United States of America of said First Russian Insurance Company Established in
75 1827 and of the United States Branch thereof and make report thereupon to this court with all convenient speed; and it is hereby further

Ordered, that said Superintendent of Insurance of the State of New York and his successors in office be and he is and they are hereby authorized, permitted, and directed to pay out of the assets in the United States of America of said First Russian Insurance Company Established in 1827 and the United States Branch thereof all reasonable and necessary expenses incurred in taking and retaining possession of such assets and in ascertaining, fixing, and determining such claims, debts, and demands; and it is hereby further

Ordered, that the said First Russian Insurance Company Established in 1827, its United States Branch managers and managing agents, officers, directors, trustees, stockholders, policyholders, servants, agents, employees, and all other persons having any property or records belonging to said First Russian Insurance Company Established in 1827, or its United States Branch, manager or managing agents, are hereby directed, to assign, transfer, and deliver to the Superintendent of Insurance of the State of New York, and his successors in office, all of such property in whosesoever name the same may be, and any and all books, papers, and records, and that any persons, firms, or corporations having any books, papers, or records relating to the business of said First Russian Insur-
76 ance Company Established in 1827, or to its United States Branch, managers, or managing agents, shall preserve the same and submit them to the Superintendent of Insurance of the State of New York or his deputies or agents for examination at all reasonable times; and it is hereby further

Ordered, that the said First Russian Insurance Company Established in 1827, the United States Branch, managers, and managing agents, and the officers, agents, and employees, thereof and all other persons be and they hereby are enjoined and restrained from the transaction of its business or the disposition of its property, and that all persons be enjoined and restrained from dealing with or disposing of the property or assets or any part of the same in the United States of America of said First Russian Insurance Company Established in 1827 or of its United States Branch, managers, or managing agents, or doing or permitting to be done any act or thing which might waste the assets or allow or suffer the obtaining of preferences, attachments, judgments, garnishments, or other liens, or the making of any levy or other legal process against said First Russian Insurance Company Established in 1827, or its United States Branch, managers, and managing agents, or its property or any part of the same; and it is hereby further

Ordered, that the policyholders and creditors in the United States of America of said First Russian Insurance Company Established

in 1827 and its United States Branch, managers, or managing
77 agents, and all other persons be and they hereby are enjoined and restrained from bringing or further prosecuting any action at law, suit in equity special or other proceedings against said First Russian Insurance Company Established in 1827, its assets or property or any part thereof, or against its United States Branch, managers, or managing agents, and from making or executing any levy or other legal process upon the property or any part of the same belonging to the First Russian Insurance Company Established in 1827, or the United States Branch thereof, or in any way interfering with the Superintendent of Insurance of the State of New York, or his successors in office, in his or their possession, control, conservation, and management of the property of said First Russian Insurance Company Established in 1827, or the United States Branch thereof, or interfering with the Superintendent of Insurance of the State of New York, or his successors in office, in the discharge of his or their duties as conservators, possessors, or liquidators herein; and it is hereby further

Ordered, that the United States Trustee, the Bankers Trust Company, and all other trustees, surrender and deliver to the Superintendent of Insurance of the State of New York, and his successors in office, immediately upon service of a copy of this order, all assets and property of every kind and description in its possession belonging to the First Russian Insurance Company Established in 1827, and
that any attachment papers, executions, levies, or other
78 processes now pending or claimed to be outstanding or pending against any of said assets or property, be also at the same time surrendered and delivered to said Superintendent of Insurance, and his successors in office, and that the validity or invalidity of any such claims, levies, attachments, or executions shall be determined in the above-entitled proceeding in accordance with law and the usual course and practice in such proceedings before this court in such cases made and provided; and it is further

Ordered, that the formal notice of the making and entry of this order in the usual form be given by the Superintendent of Insurance by publication in the public press and my mail in such manner and form as in his discretion he may deem sufficient to demand that all persons indebted to said corporation render accounts of their indebtedness and to pay any sums due the corporation to the liquidator within such period of time as the Superintendent may in his discretion fix and determine, and to give notice to all policyholders and creditors in the United States of America of said First Russian Insurance Company Established in 1827, and its United States Branch, and all persons in the United States of America having any unsatisfied claim or demand of any character against said corporation or its United States Branch, and all persons in the United
States of America holding any open or subsisting contract
79 of such corporation or its United States Branch, of this proceeding and a reasonable time and opportunity to appear and

file and present proofs of claim with the Superintendent of Insurance and to be heard thereupon, and to give notice that all claims presented will be determined and the assets distributed without further notice to persons failing to comply with the aforesaid liquidation notice. Said notice may contain such other rules and regulations as the Superintendent of Insurance may deem necessary and requisite for the purpose of ascertaining, fixing, and determining all lawful and valid claims, debts, and demands of the policyholders and creditors in the United States of America of the First Russian Insurance Company Established in 1827 and of the United States Branch thereof; and it is hereby further

Ordered, that nothing contained in this order determines the right or lien of any claimant to the funds or assets of the liquidating corporation; and it is further

Ordered, that nothing contained in this order shall affect the $150,000 par value of New York City securities delivered by the Superintendent of Insurance on the 14th day of July 1925, to the respondent Company by delivery of same to Paul E. Rasor, attorney in fact of the respondent Company, pursuant to the judgment of the Supreme Court of the State of New York, which judgment has been affirmed by the New York Court of Appeals; and it is hereby further

80 Ordered that this order is made without prejudice to the respondent Company or stockholders to take such proceedings in the courts of the State of New York, within these proceedings, as the respondent may be advised, with respect to the establishment or protection of its right, if any, to any surplus funds; and nothing in the injunction in this order contained is intended to prohibit the taking of such proceedings.

Enter:

P. I.
J. S. C.

81 *Exhibit B, attached to affidavit of John M. Downes*

At a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 13th day of July 1931.

Present: Hon. William T. Collins, Justice.

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE of New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company Established in 1827, and the interests of its policyholders, creditors, stockholders, and the public.

A motion having been made for an order resettling the order herein, dated and entered June 16, 1931, upon the remittitur of the Court of Appeals.

82 Now, upon reading and filing a notice of motion for resettlement of said order, dated June 30, 1931, and the affidavit of Frederick B. Campbell thereto annexed, sworn to June 30, 1931, and upon the papers heretofore submitted and filed herein upon the motion resulting in said order of June 16, 1931, namely, the remittitur of the Court of Appeals filed with the Clerk of this Court on the 1st day of May 1931, the notice of motion herein, dated May 1st, 1931, and the affidavits of Frederick B. Campbell, sworn to May 1st, 1931, and June 9th, 1931, the affidavit of Marc D. Ratner, sworn to April 22nd, 1931, of Michael Imchanitzky, sworn to April 29th, 1931, of John M. Downes, sworn to June 2nd, 1931, of Frederick C. Pitcher, sworn to May 27th, 1931, and of Borris M. Komar, sworn to May 25th, 1931, and upon reading and filing the affidavit of John M. Downes herein, sworn to the 8th day of July 1931, and the affidavit of J. Sidney Bernstein herein sworn to July 3rd, 1931, it is

Ordered, that the said order of June 16th, 1931, be and the same hereby is resettled so as to read as follows:

At a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the Court House in the Borough of Manhattan, City of New York, on the 16th day of June 1931.

83 Present: Hon. Phoenix Ingraham, Justice.

Order on Remittitur of the Court of Appeals.

In the Matter of The Application of The People of the State of New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company, Established in 1827, and the interests of its policyholders, creditors, stockholders, and the public.

The appellant, First Russian Insurance Company, Established in 1827, and the appellant G. Frank Dougherty and the appellant James A. Tillman, having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, First Department, dated May 29, 1930, and entered in the office of the Clerk of the said Appellate Division on June 11, 1930, which order modified and reversed in part and affirmed in part an order entered in the office of the Clerk of the County of New York on Sep-

84 tember 10, 1929, providing among other things for the disposition of the surplus assets of the First Russian Insurance Company, Established in 1827, and said appeal having been argued at the Court of Appeals; and the Court of Appeals having on the 11th day of February 1931, ordered, adjudged, and decreed that the order of the Appellate Division of the Supreme Court so appealed

from as aforesaid, and the order of the Special Term of the Supreme Court entered as aforesaid on September 10, 1929, be reversed; that an order be entered dissolving the injunction contained in the order directing liquidation; and that the surplus assets of the First Russian Insurance Company, Established in 1827, be transferred in accordance with its opinion; and the said Court of Appeals having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court of the State of New York to be proceeded upon according to law,

Now, on reading the remittitur of the Court of Appeals, filed herein on the 1st day of May 1931, and on reading the said opinion of the Court of Appeals, and upon reading and filing the notice of motion herein dated May 1st, 1931, and the affidavits of Frederick B. Campbell, verified May 1, 1931, Marc D. Ratner, verified April 22, 1931, and of Michael J. Imchanitzky, verified April 29, 1931, and proof of the service thereof, the replying affidavit of Frederic B. Campbell, verified June 9, 1931, the answering affidavit of John M. Downes, verified June 2, 1931, the affidavits of Frederic C.
85 Pitcher, verified May 25, 1931, and of Boris M. Komar, verified May 25, 1931, it is

Ordered, adjudged, and decreed:

1. That the order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court:

2. That the order of the Appellate Division of the Supreme Court for the First Department, dated May 29, 1930, and filed and entered on June 11, 1930, in the office of the Clerk of said Appellate Division, be, and the same hereby is, reversed.

3. That the order of the Special Term of New York County, entered and filed in the office of the Clerk of the County of New York on the 10th day of September 1929, be, and the same hereby is, reversed.

4. That the injunction contained in the liquidation order herein dated and entered August 8, 1925, as resettled by order dated and entered September 11, 1925, be, and hereby is, vacated and dissolved.

5. That the Superintendent of Insurance of the State of New York be, and he is hereby, permitted, authorized, and directed to pay all claims of domestic creditors in full with interest which are determined and which have not heretofore been paid, and all expenses of liquidation.

86 6. That the Superintendent of Insurance be, and he is hereby, directed to ascertain, fix, and determine as soon as possible the amounts of any and all lawful and valid claims heretofore filed herein on which attachments were obtained prior to the order directing liquidation in the above-entitled proceedings and as to such of said claims or debts as are found valid to pay the same in full with interest.

7. That the Superintendent of Insurance be, and he is hereby, permitted, authorized, and directed as soon as possible after the entry of this order to pay in full with interest all claims heretofore filed

in this proceeding, which have been determined and found by the Referee heretofore appointed herein to be valid debts or obligations of the First Russian Insurance Company, Established in 1827, or of its United States Branch, regardless of the fact that some or all of such claims may be of foreign origin and might have heretofore been classified as "foreign" claims or claims of the "second" or "third" class by the Superintendent of Insurance or by the said Referee.

8. That the Superintendent of Insurance be, and he hereby is, directed to ascertain, compute, and report to this Court with his recommendations as soon as possible, the amount and validity of any and all other claims heretofore filed in this proceeding as to such of said claims as are found by him to be valid debts or obliga-
87 tions of the First Russian Insurance Company, Established in 1827, or of its United States Branch, to pay the same in full with interest, as and when directed by this court, regardless of the fact that some or all of such claims may be of foreign origin that might have heretofore been classified as "foreign" claims or claims of the "second" or "third" class.

9. The Superintendent of Insurance shall set aside and retain in his possession funds sufficient to pay all claims heretofore filed in full with interest; the funds so retained shall be known as the "reserve fund for filed claims."

10. In addition to the "reserve fund for filed claims", the Superintendent of Insurance shall set aside and retain in his possession funds sufficient to pay (1) all further reasonable expenses of liquidation; (2) all taxes which may then be due or become due to the Government of the United States and the State of New York; and the funds so set aside and retained shall be known as the "reserve fund for taxes and expenses of liquidation."

11. The surplus assets then remaining in the possession of the Superintendent of Insurance over and above the sums set aside and retained by him as and for the "reserve fund for filed claims" and the "reserve fund for taxes and expenses of liquidation", shall be known as described as the "accrued surplus fund" of the
88 First Russian Insurance Company, Established in 1827 and its United States Branch, in the above entitled proceeding.

12. The "accrued surplus" fund as herein above defined and increment received thereon shall be held by the Superintendent of Insurance for a period of four months after the date of the entry of this order, for the purpose of and subject to attachment and/or execution by creditors or other persons, firms, or corporations having claims against the First Russian Insurance Company, Established in 1827, or its United States Branch, which claims were not, prior to the date of the entry of this order, filed with the Superintendent of Insurance; and each and every creditor or other person, firm, or corporation having or asserting such claims against the First Russian Insurance Company, Established in 1827, or its United States Branch, shall be permitted to maintain an action against said Com-

pany in the Courts of this State through levy of attachment or execution or otherwise against said "accrued surplus fund" in the manner provided by law.

13. After the expiration of the said period of four months after the entry of this order, the Superintendent of Insurance shall, and he is hereby, authorized and directed to pay over to the First Russian Insurance Company, Established in 1827, as represented by a quorum of its board of directors, consisting of Leonid Davydoff, Count Alexandre Mordvinoff and Victor de Yermoloff, any
89 balance of the said "accrued surplus fund" then remaining in his hands which has not been levied upon by virtue of warrant of attachment or execution.

14. The "reserve fund for filed claims" shall be held separate and apart from the "accrued surplus fund" and from any other funds or assets of the First Russian Insurance Company, Established in 1827, and its United States Branch, and said "reserve fund for the filed claims" shall not be subject to levy by warrant of attachment or execution.

15. If any claim heretofore filed herein is disallowed and the disallowance thereof confirmed by a final order of the court, then the Superintendent of Insurance shall transfer the amount set aside for the payment of such disallowed claims to the "accrued surplus fund" and it shall thereupon become and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund."

16. If any claim heretofore filed is allowed in a reduced amount and the allowance in such reduced amount confirmed by a final order of the court, then the Superintendent of Insurance shall transfer the excess of the amount set aside for the payment thereof over and above the amount necessary to satisfy the claim in its then reduced amount to the "accrued surplus fund", and it shall thereupon become and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund."

90 17. After the final disposition of all claims heretofore filed herein either by payment thereof or by a final order of the court confirming the disallowance thereof, the Superintendent of Insurance is authorized and directed to transfer to the "accrued surplus fund" any balance of said "reserve fund for filed claims" and any other funds or assets of the said Company then remaining in his hands after making reservation of funds sufficient to pay his proper charges and expenses, and said sums so transferred shall thereupon become part of the said "accrued surplus fund" and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund."

18. The Superintendent of Insurance is hereby directed to make and file within forty-five days from the date of this order an account of his proceedings as liquidator of the First Russian Insurance Company, Established in 1827, from March 7, 1929, down to the date of this order.

19. Any party to this proceeding may hereafter apply at the foot of this decree for such further relief as he may be advised.

Enter:

P. I.,
J. S. C.

Enter:

W. T. C.
J. S. C.

91 *Exhibit C, attached to affidavit of John M. Downes*

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City, County, and State of New York, in the First Judicial District, on the 13 day of May 1932.

Present: Hon. Edward J. Glennon, Justice.

County Clerk's Number 26150–1925

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE of New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company Established in 1827, and the interests of its policy holders, creditors, stockholders, and the public

A motion having been made by George S. Van Schaick, Su-
92 perintendent of Insurance of the State of New York, as liquidator of the domesticated United States Branch of the First Russian Insurance Company Established in 1827, by a notice of motion dated February 5, 1932, for an order ratifying, approving, and confirming in all respects said report, audit, and petition, the proceedings had and taken and things done in connection with the liquidation of the domesticated United States Branch of the First Russian Insurance Company Established in 1827, the income and assets received, the disbursements made, the bills rendered to the liquidator and expenses incurred excepting as set forth in Exhibit H, Schedule III, of said report, the allowances and disallowances of claims and the accrued expenses of liquidation as in said report stated; authorizing, directing, and permitting the Superintendent of Insurance to reserve out of the surplus assets in his possession in this proceeding cash funds or cash funds and securities in the sum of and of the cash value of One Hundred Forty-two Thousand Five Hundred Sixty-seven and 46/100 ($142,567.46) Dollars, for expenses of liquidation and taxes, as stated in said report, audit, and petition; authorizing, permitting, and directing that the balance of surplus assets, consisting of cash funds or cash funds and securities in pos-

session of the liquidator amounting to One Million One Hundred Nineteen Thousand Six Hundred Thirty and 96/100 ($1,119,630.96) Dollars, as carried on the books of the liquidator and subject to any existing liens or preferences against same, be reserved by the
93 liquidator to be applied pro rata to payment of such claims as may be hereafter allowed which were filed with the liquidator not later than June 16, 1931, or applied to payment of such foreign claims and attachments in such manner as the court may hereafter direct; declaring that there are no surplus assets in this proceeding available at the time this report is filed against which attachments may be levied, and declaring that there are no surplus assets in possession of the liquidator in this proceeding available at the time of filing this report to be transferred and paid over to First Russian Insurance Company Established in 1827, as represented by a quorum of its directors, consisting of Leonid Davidow, Victor Yermoloff and Count Alexandre Nordvinoff, pursuant to the decision of the Court of Appeals in Matter of People (First Russian Ins. Co.), 225 N. Y. 415, and the order of the Supreme Court, New York County, dated and entered June 16, 1931, as resettled by an order dated and entered July 13, 1931; ordering and directing that all persons interested or who may have any claim or claims not filed in this proceeding, which might heretofore have been presented in this proceeding, be barred and foreclosed from presenting or filing any claim or claims with the liquidator in this proceeding or any claim or claims against the assets in this proceeding in possession of the liquidator; ordering and directing that the funds reserved by the liquidator, as in said report stated, be not subject to levy, attachment or execution by claimants or creditors of the First Russian Insurance Company Established in 1827, or its United
94 States Branch, excepting for the purposes or claims for which said funds are reserved and for such other and further relief as may to the court seem just, proper, and equitable in the premises;

Now, on reading the said third report, audit, and petition, duly verified the 30th day of January 1932, and duly filed with exhibits annexed thereto in the office of the Clerk of the County of New York on the 5th day of February 1932, and upon reading and filing the notice of filing said report, audit, and petition, and notice of motion to confirm the same, dated February 5, 1932, with proof of due service thereof upon all interested persons, and upon reading the decision of the Court of Appeals in this proceeding, reported in 255 N. Y. 415, the remittitur of the Court of Appeals upon said decision, dated February 10th, 1931, and the order of this Court upon said remittitur, dated and entered June 16, 1931, as resettled by an order of this Court dated and entered July 13, 1931, and upon reading and filing the affidavits of John M. Downes, duly sworn to on the 4th day of March 1932, and the 10th day of March 1932, respectively, in answer to objections filed in behalf of Sergei Serebrennikoff, Victor Yermoloff, Bessie Smith, Anna Binder, and G. Frank Doherty, as assignee of Alexis Davidow and Weniaman G. Toptcheenko, and Zygfryd

Englisch, in support of said motion to confirm; and upon reading and filing ~~the objections of Bessie Smith herein, dated and verified the 29th day of February 1932,~~ the affidavit of Maximillian
95 L. Blek, attorney for Anna Binder, sworn to the 29th day of February 1932, ~~the objections of Sergei Nicolaevith Serebrennikoff, verified the 1st day of March 1932 objections in behalf of Victor Yermoloff, verified the 1st day of March 1932, the objections of G. Frank Dougherty, as assignee of Alexis Davidow and Weniamin G. Toptcheenko, verified the 1st day of March 1932,~~ and the affidavit of Jacob Jolles, in behalf of Zygfryd Englisch, sworn to the 4th day of March 1932, in opposition to said motion to confirm; and after hearing Joseph G. Bill, Esq., attorney for the Superintendent of Insurance of the State of New York, as liquidator of the United States Branch of First Russian Insurance Company Established in 1827, by John M. Downes, Esq., of Counsel, and Messrs. Campbell & Whipp, attorneys for First Russian Insurance Company Established in 1827, by Frederick B. Campbell, Esq., of counsel, in support of said motion to confirm the said report, audit, and petition; and J. Sidney Bernstein, Esq., attorney for James A. Tillman, and Borris M. Komar, Esq., attorney for various foreign claimants, appearing but not opposing the motion; and after hearing Messrs. Blum & Jolles, attorneys for Zygfryd Englisch, an attachment creditor, by Jacob Jolles, Esq., of counsel, Messrs. Englehard, Pollak, Pitcher & Stern, attorneys for G. Frank Dougherty, as assignee of Alexis Davidow and Weniamin G. Toptcheenko, Sergei Nicolaevitch Sere-
96 brennikoff, and of counsel for Victor Yermoloff in this proceeding, by G. Frank Dougherty, of counsel, in support of their respective objections herein and in opposition to said motion to confirm said report, audit and petition; and due deliberation having been had; and upon filing the decision of the Court, it is, on motion of Joseph G. Bill, Esq., attorney for the Superintendent of Insurance, as liquidator of the domesticated United States Branch of First Russian Insurance Company Established in 1827.

Ordered, adjudged, and decreed that said report, audit, and petition be and hereby is corrected so that the cash funds or cash funds and securities to be reserved by the liquidator to be applied to payment of such claims as may be hereafter allowed, stated at page 7 of the petition of the liquidator, shall read, "$1,149,630.96" instead of "$1,119,630.96"; that the item "Assets, June 16th, 1931, $1,363,198.42", appearing at page 118 of the said report by the Special Deputy Superintendent of Insurance, by and the same hereby is corrected to read, "Assets, June 16th, 1931, $1,393,198.42"; that the "Amount required in excess of assets in possession of liquidator, $3,409,126.54", appearing at page 118 of the said report, be and the same hereby is corrected to read "Amount required in excess of assets in possession of liquidator, $3,379,126.54"; that the cash funds or cash funds and securities in possession of the liquidator recommended to be reserved by the liquidator to be applied to payment of such claims as may be hereafter allowed, appearing at page 120 of

said report, be and the same hereby is corrected to read, "$1,149,-630.96" instead of "$1,220,630.96"; and it is hereby further

97 Ordered, adjudged, and decreed that any and all of objections to said report, audit and petition be and the same hereby are in all respects disallowed, overruled, and dismissed; and it is hereby further

Ordered, adjudged, and decreed that the said third report, audit, and petition, as corrected, the proceedings and actions had and taken and things done in connection with the liquidation of the domesticated United States Branch of First Russian Insurance Company Established in 1827, the income and assets received, the disbursements made and the bills rendered to the liquidator and expenses incurred, excepting as set forth in Exhibit H, Schedule III, or said report, audit, and petition, the allowances and disallowances of claims, and the accrued expenses of liquidation, as in said report stated, be and the same hereby are in all respects ratified, approved, and confirmed; and it is hereby further

Ordered, adjudged, and decreed that the assets in this proceeding be and the same hereby are fixed and determined at the sum of $1,393,198.42, as carried upon the books of the liquidator, and as more fully set forth in said third report, audit, and petition in Exhibit A, at Page 92 thereof; and it is hereby further

Ordered, adjudged, and decreed that the expenses and disbursements incurred and/or paid by the Superintendent of Insur-

98 ance, as liquidator, from March 7, 1929 to June 16, 1931, aggregating the sum of $112,646.54, as more fully set forth in said third report, audit, and petition in Exhibit C, at pages 125–141, inclusive, thereof, and the accrued bills rendered and paid from June 17, 1931 to September 30, 1931, and the expenses accrued and bills rendered but unpaid from June 17, 1931 to September 30, 1931, as set forth in Exhibit H, Schedules I and II of said report, audit, and petition, at pages 339–345, inclusive, thereof, be and the same are in all respects allowed, ratified, approved, and confirmed; and it is hereby further

Ordered, adjudged, and decreed that the General Fund of the State of New York be reimbursed by the Superintendent of Insurance, as liquidator of the above-entitled proceeding, in the sum of $1,332.45 for the pro rata part of the annual salary paid to Clarence C. Fowler, Esq., and Richard A. Brennan, Esq., as Chief of the Liquidation Bureau of the New York State Insurance Department, and chargeable to the above-entitled proceeding from March 7, 1929 to June 16, 1931, as more fully set forth in said report, audit, and petition, in Exhibit A, at page 100 thereof; and it is hereby further

Ordered, adjudged, and decreed that the foreign claims set forth in said report, audit, and petition in Exhibit E, pages 158–333 thereof, be and the same hereby are disallowed as foreign non-

99 United States Branch claims, but that said claims, together with any other foreign non-United States Branch claims which may have been filed with the liquidator prior to June 16, 1931,

may be proven with and passed upon by the liquidator pursuant to the directions contained in the decision of the Court of Appeals in Matter of People (First Russian Ins. Co.), 255 N. Y. 415; and by the order of this Court in this proceeding, dated and entered June 16, 1931, as resettled by an order of this Court, dated and entered July 13, 1931, and it is hereby further

Ordered, adjudged, and decreed that payments of interest on claims, as set forth by the liquidator in said report, audit, and petition, in Exhibit F, Schedules I, II, and III, at pages 335–337, inclusive, thereof, be and the same hereby are in all respects ratified, approved, and confirmed; and it is hereby further

Ordered, adjudged, and decreed that the superintendent of insurance be and he hereby is permitted, authorized, and directed to reserve and retain in his possession, as liquidator, cash funds or cash funds and securities in this proceeding in the sum of or of the cash value of $142,567.46 for expenses of liquidation and taxes, as stated in said report, audit, and petition at page 118 thereof, and that the remainder or balance of such surplus assets in this proceeding, consisting of cash and securities amounting to $1,149,630.96, as carried in the accounts of the liquidator, and which
100 assets may or may not yield a cash sum of $1,149,630.96, be reserved by the superintendent of insurance to be applied pro rata to payment of such foreign claims as may be hereafter allowed, which were filed with the liquidator herein not later than June 16th, 1931, or applied to payment of said foreign claims and attachments in such manner as the Court may hereafter direct, provided, however, that should the applications of Michael Imchanitzky, Esq., and Messrs. Campbell & Whipp, now pending undecided in this Court, result ultimately in decisions granting in whole or in part the respective reliefs prayed for in said applications, then and in such case or cases the said balance of surplus assets, amounting to $1,149,630.96, shall be subject to deduction therefrom of any amount or amounts which may be hereafter awarded or directed to be paid as a result of said applications; and it is hereby further

Ordered, adjudged, and decreed that at the time said report, audit, and petition was filed, and at the date of this order, there are no surplus assets available in this proceeding against which attachments may be levied, as provided in and by the decision of the Court of Appeals in 255 N. Y. 415 in this proceeding, and that there are no surplus assets in possession of the superintendent of insurance in this proceeding available at the time of filing said report, audit, and petition or at the date of entry of this order,
to be transferred and paid over to First Russian Insurance
101 Company Established in 1827, as represented by a quorum of its directors, consisting of Alexis Davidow, Victor Yermoloff, and Count Alexandre Mordvinoff, pursuant to the decision of the Court of Appeals in this proceeding, in Matter of People (First Russian Ins. Co.), 255 N. Y. 415, and the order of the Supreme Court, New York County, dated and entered June 16th,

1931, as resettled by an order dated and entered July 13, 1931; and it is hereby further

Ordered, adjudged, and decreed that any and all persons or parties interested in this proceeding, or who may have or may hereafter have any claim or claims against the First Russian Insurance Company Established in 1827, or its United States Branch, which said claim or claims might heretofore have been filed in this proceeding, or any claim or claims whatsoever against the assets in this proceeding in possession of the Liquidator excepting as authorized in and by this order, and whose claims were not filed with the liquidator prior to June 16th, 1931, be and they hereby are barred and foreclosed from presenting and/or filing any such claim or claims with the liquidator in this proceeding or any claim or claims whatsoever against the assets in this proceeding in possession of the liquidator, excepting as authorized in and by this order; and it is hereby further

Ordered, adjudged, and decreed that the funds reserved by the liquidator, as shown in and by his third report, audit, and
102 petition in this proceeding, and/or as may be directed herein to be reserved by said liquidator, shall not be subject to levy, attachment, or execution by claimants or creditors of the First Russian Insurance Company Established in 1827, or its United States Branch, excepting for such purposes or claims as said funds are directed to be reserved, and in any event only in the amount and to such extent as such claim or claims may be allowed and payable; and it is hereby further

Ordered, adjudged, and decreed that the Superintendent of Insurance, as liquidator, proceed with all convenient speed to carry out the directions and liquidate the non-United States claims which may have been filed with him on or before June 16, 1931, as directed in and by the decision of the Court of Appeals in Matter of People (First Russian Ins. Co.), 255 N. Y. 415, and by the order of this Court, in this proceeding, dated and entered June 16th, 1931, as resettled by an order of this Court, dated and entered July 13, 1931.

Enter:

E. J. G.,
J. S. C.

103 *Exhibit D, attached to affidavit of John M. Downes*

At a Special Term, Part II, of the Supreme Court held in and for the County of New York at the Court House in the Borough of Manhattan, City of New York, on the 7th day of December 1934.

Present: Hon. Isador Wasservogel, Justice.

County Clerk's No. 26150—1925

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE OF New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company Established in 1827, and the interests of its policyholders, creditors, stockholders and the public

MATTER OF PETITION OF FREDERICK B. CAMPBELL AND CAMPBELL & Whipp, for an order adjudging and enforcing attorneys' lien and directing payment of claim

104 Appeals having been taken to the Court of Appeals by the Superintendent of Insurance of the State of New York, as liquidator of First Russian Insurance Company Established in 1827, Georg Brusendorff, George J. Hadjinoff, Andrew Ditmar, and others, from the order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered the 15th day of June, 1934, in the above-entitled proceeding, which affirmed with $20.00 costs and disbursements an order of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on February 27, 1934, directing the Superintendent of Insurance of the State of New York, as liquidator of First Russian Insurance Company Established in 1827, to pay to the petitioners Frederick B. Campbell and Paul C. Whipp, as copartners under the firm name of Campbell & Whipp, the sum of One Hundred Twenty-eight Thousand Ten and 58/100 Dollars ($128,010.58) together with interest thereon from June 16, 1931, to date of payment; and the said appeals having been duly argued at the Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudged that the said order so appealed from as aforesaid be affirmed with costs, and having further ordered that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law;

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Campbell & Whipp, the petitioners above named, it is

105 Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter:

I. W.,
J. S. C.

106 *Exhibit E, attached to affidavit of John M. Downes*

At a Special Term Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse, Pearl and Centre Streets, Borough of Manhattan, City of New York, on the 7th day of December 1934

Present: Hon. Isidore Wasservogel, Justice.

Order on Remittitur of Court of Appeals No. 26150/25

IN THE MATTER OF THE APPLICATION OF THE PEOPLE OF THE STATE OF New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company Established in 1827, and the interests of its policyholders, creditors, stockholders and the public

MATTER OF PETITION OF MICHAEL IMCHANITZKY, FOR AN ORDER DIRECTing payment of claim under assignment

The appellants, the Superintendent of Insurance of the
107 State of New York, as liquidator of First Russian Insurance Company, Established in 1827, George J. Hadjinoff and other creditors, Georg Brusendorff and other creditors, and Andrew Ditmar, a claimant, having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered June 15th, 1934, in the above entitled proceeding, which order affirmed, with $20 costs and disbursements, an order of the Supreme Court of the State of New York, County of New York, dated the 26th day of February 1934, and entered in the office of the Clerk of the County of New York, on the 27th day of February 1934, authorizing and directing the Superintendent of Insurance, as Liquidator of the First Russian Insurance Company, Established in 1827, to pay to the petitioner herein the sum of $38,403.17, with interest thereon from June 16th, 1931, to the date of payment; and said appeal having been duly argued at the Court of Appeals, and after due deliberation, the Court of Appeals, having, on the 4th day of December 1934, ordered and adjudged that the order of the Appellate Division of the Supreme Court, First Judicial Department, so appealed from as aforesaid, be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of
108 Appeals herein, and upon motion of George Frankenthaler, Esq., the attorney for the petitioner Michael Imchanitzky, it is

Ordered, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

Enter:

I. W.,
J. S. C.

In United States District Court, Southern District of New York

Equity 79—160

UNITED STATES OF AMERICA, COMPLAINANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, defendant

Order and decree

Filed December 21, 1934

The complainant, on November 14, 1934, having filed its bill of complaint herein, verified November 14, 1934; and complain-
109 ant thereafter having filed a bill of particulars of said complaint dated December 10, 1934;

And complainant having moved by order to show cause dated December 7, 1934, upon the aforesaid bill of complaint and upon the affidavit of Leon E. Spencer, verified December 7, 1934, and the papers thereto attached, for an injunction pendente lite restraining the defendant from distributing any part of the funds alleged in the bill of complaint to be in the possession of the defendant, except such portion of these assets as the defendant herein has been directed by an order of the Supreme Court of New York, New York County, Special Term, to retain in a special account for the purpose of meeting expenses of administration of the proceeding in the Supreme Court under Section 63 of the Insurance Law of the State of New York to liquidate domestic claims adjudicated and allowed therein, as set forth in Paragraph 5 of the complaint herein; and defendant, in opposition to complainant's motion for an injunction pendente lite, having filed with the Court the affidavit of John M. Downes, verified December 10, 1934, and the exhibits thereto attached marked A, B, C, D, and E;

And the defendant, by order to show cause dated December 8, 1934, having moved for an order dismissing the bill of complaint on the ground that said complaint fails to state facts sufficient to constitute a cause of action;

And the cause having come on to be heard;

Now, upon reading the papers filed herein above recited,
110 and after hearing Martin Conboy, Esq., United States District Attorney for the Southern District of New York, on behalf of the complainant, United States of America, in support of the bill of complaint and of the motion for an injunction pendente lite, and John M. Downes, Esq., on behalf of defendant, in support of motion to dismiss the bill of complaint and in opposition to complainant's motion for an injunction pendente lite; and due deliberation having been had;

And upon motion of John M. Downes, Solicitor for the defendant, it is

Ordered, adjudged, and decreed that the defendant's motion to dismiss the bill of complaint for insufficiency be and hereby is granted, and the motion of the complainant for an injunction pendente lite be and hereby is denied; and that the bill of complaint be and hereby is dismissed.

And complainant having applied for a suspension pending appeal, of the order and decree, and defendant having opposed the allowance thereof, it is further

Ordered that the operation of this order and decree be and hereby is suspended until the coming down and the filing in this Court of the mandate of the United States Circuit Court of Appeals upon an appeal by complainant to such Court, upon the conditions hereinafter specified, namely:

111 (a) that the petition and allowance of appeal, the assignment of errors and the citation be filed and served within two (2) days from the date hereof;

(b) that the printed transcript of the record shall be made, filed, and served by the complainant within ten (10) days from the date hereof;

(c) that complainant will apply to the United States Circuit Court of Appeals for the hearing of such appeal upon a date as near the commencement of the January 1935 term (January 7, 1935) of said Court as may be possible; and

(d) that complainant's brief on appeal will be served upon defendant's solicitors ten days prior to the date so set for argument of such appeal.

December 20, 1934.

ALFRED C. COXE,
U. S. D. J.

[File endorsement omitted.]

112 In United States District Court, Southern District of New York

[Title omitted.]

Petition and allowance of appeal

The complainant, United States of America, by Martin Conboy, United States Attorney for the Southern District of New York, considering itself aggrieved by the order and decree in the above-entitled cause dated December 20, 1934, and filed December 20, 1934, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors filed herewith and prays that this appeal be allowed, that a citation be issued, directed to the above-named defendant commanding it to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may be just in the premises, and that a transcript
113 of the record, proceedings, and papers upon which the said decree and order were made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit.

MARTIN CONBOY,
United States Attorney for the Southern District of New York, Solicitor for Complainant, Office & P. O. Address, U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Ordered that the appeal prayed for by the complainant, United States of America, be and hereby is allowed.

Dated, New York, N. Y., December 22nd, 1934.

ALFRED C. COXE,
U. S. D. J.

114 In United States District Court, Southern District of New York

[Title omitted.]

Assignment of errors

Now comes the complainant, United States of America, and files the following assignment of errors upon which it will rely on its appeal from the order and decree in the above entitled cause made and entered on December 20, 1934:

1. The Court erred in granting the motion of the defendant to dismiss the bill of complaint for failure to state facts sufficient to constitute a cause of action.

2. The Court erred in granting the motion of the defendant to dismiss the bill of complaint for insufficiency.

3. The Court erred in denying the motion of the complainant for an injunction pendente lite.

115 4. The Court erred in holding that the assignment from the Union of Soviet Socialist Republics to the complainant, dated

November 16, 1933, did not transfer to the complainant all of the right, title, and interest of the First Russian Insurance Company established in 1827, and all the right, title, and interest of all of its stockholders, in all of the property of the First Russian Insurance Company, established in 1827, in the United States, including the cash, securities, and other assets held by the defendant.

5. The Court erred in holding that the decrees of the Russian State nationalizing the First Russian Insurance Company, established in 1827, and appropriating all of its property in the United States, including the cash, securities, and other assets held by the defendant, are opposed to the public policy of the United States.

6. The Court erred in holding that the decrees of the Russian State nationalizing the First Russian Insurance Company, established in 1827, were ineffectual to reach the properties of the First Russian Insurance Company, established in 1827, in the United States.

7. The Court erred in holding that recognition of the Soviet Government by the United States did not change the confiscatory nature of the decrees of the Russian State nationalizing the First Russian Insurance Company, established in 1827, and appropriating all of its property in the United States, including the cash, securities, and other assets held by the defendant.

116 8. The Court erred in holding that the decrees of the Russian State did not appropriate and transfer to the Russian State all of the right, title, and interest of the First Russian Insurance Company, established in 1827, and all of the right, tile, and interest of all of its stockholders in all of the property of the First Russian Insurance Company, established in 1827, in the United States including the cash, securities, and other assets held by the defendant.

9. The Court erred in holding that by the decrees of the Russian State the said Russian State did not become the liquidator of all of the assets of the First Russian Insurance Company, established in 1827, including the cash, securities, and other assets held by the defendant.

Wherefore, complainant prays that the said order and decree, made and entered December 20th, 1934, be reversed and that the said Court may be directed to grant the complainant's motion for an injunction *pendente lite* as prayed for in the bill of complaint.

Dated, New York, N. Y., December 22, 1934.

MARTIN CONBOY,

United States Attorney for the Southern District of New York, Solicitor for Complainant, Office and P. O. Address: U. S. Courts and P. O. Bldg., Borough of Manhattan, New York City.

117 [Citation in usual form omitted in printing.]

118 In United States District Court, Southern District of New York

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated January 14, 1935.

MARTIN CONBOY,
U. S. Attorney, Attorney for Complainant-Appellant.
JOHN M. DOWNES,
Attorney for Defendant-Appellee.

119 [Clerk's certificate to foregoing transcript omitted in printing.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

October Term, 1934—Cal. No. —

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827, defendant-appellee

Order

Upon the annexed consent and upon the motion of F. W. H. Adams, United States Attorney for the Southern District of New York, attorney for complainant-appellant, it is hereby

Ordered that Louis H. Pink, Superintendent of Insurance of the State of New York, liquidator of the domesticated United States branch of the First Russian Insurance Company, established in 1827, be and hereby is substituted for defendant-appellee, George S. Van Schaick, and it is

Further ordered that this suit be and it hereby is revived and continued under the title "United States of America, complainant-appellant, against Louis H. Pink, Superintendent of Insurance of the State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, established in 1827, defendant-appellee."

Dated New York, N. Y., May 21st, 1935

WM. PARKIN, *Clerk.*

Filed May 23, 1935.

United States Circuit Court of Appeals for the Second Circuit

October Term 1934—Cal. No. —

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States branch of the First Russian Insurance Company, Established in 1827, defendant-appellee

Stipulation

Whereas, Louis H. Pink has succeeded the above named defendant-appellee as Superintendent of Insurance of the State of New

York, liquidator of the domesticated United States branch of the First Russian Insurance Company, established in 1827, it is hereby

Stipulated and agreed that Louis H. Pink, Superintendent of Insurance of the State of New York, liquidator of the domesticated United States branch of the First Russian Insurance Company, established in 1827, may be substituted for the defendant-appellee, George S. Van Schaick, and that this suit may be revived and continued under the title "United States of America, complainant-appellant, against Louis H. Pink, Superintendent of Insurance of the State of New York, liquidator of the domesticated United States branch of the First Russian Insurance Company, established in 1827, defendant-appellee."

Dated New York, N. Y., May 1935.

F. W. H. ADAMS,
Complainant-Appellant.
JOHN M. DOWNES,
Solicitor for Defendant-Appellee.

United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827, defendant-appellee

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges

In equity. Appeal from a decree of the District Court for the Southern District of New York dismissing the bill of complaint. Affirmed.

Martin Conboy, United States attorney, for complainant-appellant; Francis H. Horan, Edward J. Ennis, assistant United States attorneys.

John Downs, Alfred L. Green, Victor S. Cohen, Clarence C. Fowler, counsel for defendant-appellee.

PER CURIAM: Affirmed on the authority of *United States* v. *Bank of New York and Trust Company* handed down herewith.

United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

BANK OF NEW YORK AND TRUST COMPANY, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, SUCCESSOR to the Bank of Manhattan Trust Company, defendant-appellee

UNITED STATES OF AMERICA, COMPLAINANT-APPELLANT

against

GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1817, defendant-appellee

MANTON, Circuit Judge, dissenting.

The complaints in these actions ask for accountings seeking to recover balances held by Russian insurance corporations, Moscow Fire Insurance Company of Moscow, Russia; The First Russian Insurance Company, and Northern Insurance Company of Moscow, Russia, held by the respective banks, appellees, as depositories. Each insurance company had its principal offices in Russia.

In Bank of New York and Trust Company case, the complaint alleges that in 1917 and 1920 decrees of the Russian State dissolved the Moscow Fire Insurance Company; that all of its right, title and interest and all the right, title and interest of the stockholders in its property, including deposits made with the Superintendent of Insurance of the State of New York, was confiscated and appropriated by the Russian State. It alleges that, on April 18, 1933, the claims of domestic creditors to the fund deposited with the Superintendent of Insurance of New York had been satisfied and that he, pursuant to an order of the Supreme Court of New York, directed that the fund be released and paid, and the balance transferred and delivered to the agent or depository of the Moscow Insurance Company, not to be withdrawn except upon an order of a court of competent jurisdiction; that the appellee received and had cash securities amounting to $1,180,399.54. It set forth an assignment on November 16, 1933, by the Russian State to the appelant for valuable consideration, of all the right, title and interest in and to the cash and securities constituting the balance of the deposit and also that the appellant by assignment had all the right, title and interest of all Russian nationals in and to this cash and securities, and that it was the sole and exclusive owner entitled to immediate possession. It alleges a demand of and refusal by appellee to deliver this property to appellant and the wrongful withholding thereof.

In the Van Schaick case, the complaint pleaded that the First Russian Insurance Company had been dissolved by decree of the Russian State and its property, including its deposit with the Superintendent of Insurance of New York, had been confiscated and appropriated by the Russian State. It alleges that on August 8, 1925, by order of the New York State Supreme Court, the Superintendent of Insurance took possession of the property of the domestic United States branch of that insurance company (established 1907) under section 63 of the insurance law of the State. That all domestic claims had been adjudicated and allowed, leaving undisposed of certain foreign claims which arose in the conduct of the

business outside of the United States; that two claimants residing in the city of New York had been allowed $128,010.58 and $38,403.17 each, respectively, by an order of the State supreme court on February 26, 1934. That on appeal to the appellate division of the supreme court of the State, this award was affirmed (June 15, 1934) but that an appeal was taken to the Court of Appeals of the State of New York and is undisposed of. An assignment of the balance of $1,170,783.36, as of November 16, 1933, is pleaded.

In the case of president and directors of the Manhattan Company, it is pleaded that the Northern Insurance Company of Moscow, is a Russian corporation with a branch in New York, and that it made a deposit with the superintendent of insurance of New York to comply with the requirements of the insurance law. That, it too, had been dissolved back in 1917 and 1918, and its property confiscated by the Russian State. That the superintendent of insurance took possession August 3, 1933; the claims of domestic creditors as to this fund, deposited with the superintendent of insurance, were satisfied, pursuant to an order of the State supreme court, and directed that the funds be released, paid, and transferred to the agent or depository of the Northern Insurance Company of Moscow, said funds to be withdrawn upon order of a court of competent jurisdiction. The amount here involved was $332,994.15 held by the appellee. It is alleged that this, too, was assigned on November 16, 1933. Demands were made for the payment of these moneys pursuant to this assignment, and refused.

In each case a restraining order against disposition pending the trial of a suit was denied, and on motion supported by affidavits, each of the complaints was dismissed.

The United States claims title to these balances, and asks for an accounting by virtue of two assignments executed by agents of the Russian Government—the Ughet and Litvinov assignments, the first executed prior to, and the second since recognition. The questions presented are: (1) does the claim of the Government to the balance named in the hands of the appellees come within the terms of the so-called "Litvinov assignment"; and (2) assuming it does, what is the effect of a political recognition of the Union of Soviet Socialist Republics, and should such recognition be retroactive and extraterritorial in its effect?

As to the first question: On the 16th of November 1933, Litvinov, the People's Commisar for Foreign Affairs of the Soviet Union, executed in his official capacity, an assignment which was a part of the general scheme of recognition of the Soviet Union by the terms of which it assigned to the Government of the United States,

"the amounts admitted to be due or that may be found to be due it (the Soviet Government), as the successor of prior governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, * * *."

Questions as to this assignment must be resolved according to the maxims and principles of the law of nations (*Henfield's Case*, 11

Fed. Cas. p. 1089, 1101), which require that a formal engagement between two nations—whether such engagement be in the form of a treaty or of an executive agreement—should be construed as liberally and untechnically as the exigencies of the case may demand in order to effectually carry out the evident or probable design of the parties in executing it. *Ware* v. *Hilton*, 3 Dall. 299; *The Amiable Isabella*, 6 Wheat. 71; *United States* v. *Arredondo*, 6 Pet. 691; *Geofroy* v. *Riggs*, 133 U. S. 267; *Wright* v. *Henkel*, 190 U. S. 40; *Rocca* v. *Thompson*, 223 U. S. 317.

"Such solemn international instruments between independent sovereignties as public treaties, intended primarily for the common advancement of their individual interests, the interests of civilization, and the promoton of international amity, are not to be read as rigidly as documents between private persons governed by a system of technical law, but, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence, should be construed in the light of that larger reason, that broader, fairer, and more liberal sense calculated to perpetuate that international concord which constitutes the spirit of the law of nations" (Puente, International Law, p. 228).

The ultimate design of the two countries in executing this assignment was to transfer "the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America, and the claims of their nationals", to the broad plane of diplomacy, and by placing those claims beyond the reach of vexatious judicial action, to facilitate at one stroke, the adjustment of the delicate points at issue between the two countries. No narrow or strained construction of that instrument is permissible under these circumstances. The funds at issue are admitted to be the balances of the assets of Russian corporations with branch offices here affected by the Soviet decrees whose local business was liquidated by the courts of the State of New York. *Matter of Moscow Fire Ins. Co.*, 255 N. Y. 433. If it be sound, as the appellant contends, that the effect of the Soviet decrees is to vest in the Soviet Government complete title to those funds, and to give that government a cause of action to recover them, then, on that hypothesis, we would be bound to hold that the funds in the safe keeping of appellee—an "American national"—are such as "may be found to be due" the Soviet Government within the terms of the assignment; that is, which "ought to be paid" by appellee, or which "may be demanded" by the assignor. 1 Bouvier, Law Dictionary, 3rd Ed. by Rawle, 946; *Ransom* v. *Bidwell*, 89 Conn. 137. The fact that by the terms of the assignment the Soviet Government has renounced its right to sue American nationals who may be indebted to it, is a circumstance strongly urging upon us the broadest possible interpretation of the terms of the assignment. If, however, the effect of the Soviet decree is not such as to vest title to the funds in the Soviet Govern-

ment, then there would be no question that the funds would not fall within the terms of the assignment and the claims of the appellant must fail. Whether or not the funds here involved are included in the terms of the assignment depend upon the juristic effect of the political act of recognition, and on the degree of extraterritorial force which international comity—the *comitas gentium*—ordains that we should give to Soviet legislation of this character.

The conduct of the international relations of the nation is a matter of state (*The Rogdai*, 278 Fed. 294) which the Constitution has properly placed in the hands of the executive and legislative, that is, the "political" departments of the national government, and the propriety of whatever may be done in the exercise of this political power is not subject to judicial review or inquiry. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Terrazas* v. *Donohue*, 227 S. W. 206 (Court of Civil Appeals, Tex.). No doctrine of public law is more firmly established than this: That it belongs exclusively to the department constitutionally in charge of the external affairs of the nation to recognize or decline to recognize a new government in an old state or a new state carved out of an old one (*Rome* v. *Himely*, 4 Cranch. 272; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Kennett* v. *Chambers*, 14 How. 38; *Selnicki* v. *Phila. Natl. Bank*, 273 Pa. 110) and to determine, in case of recognition, who is the *de jure* or *de facto* sovereign in such country. *Jones* v. *United States*, 137 U. S. 202; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Agency of Canadian Car & Foundry Co.* v. *American Car Agency*, 258 Fed. 363 (C. C. A. 2). That determination, when made by the political department of the government, concludes our courts on the legal status of such sovereign or government. *Ricaud* v. *Amer. Metal Co.*, 246 U. S. 304; *Jones* v. *U. S.*, 137 U. S. 202, 212; *Republic of Peru* v. *Peruvian Guano Co.*, 36 Ch. Div. (1887) 489.

Recognition is adequately defined as the act by which a state, which is already a member of the community of nations, signifies that it accepts another state as a juristic person of international law, with all the rights and obligations which the law establishes. *A. M. Luther* v. *James Sagor & Co.*, (1921) 3 K. B. Div. 549. While recognition is not necessary to enable a state to maintain its internal sovereignty (*McIlvaine* v. *Coxe's Lessee*, 4 Crane 209, 212; *Wulfsohn* v. *Russian S. F. S. Republics*, 234 N. Y. 372; *Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 226, 227; Wheaton's International Law, Lawrence's Ed. p. 36), the authorities are nevertheless in accord that it is ordinarily indispensable to make the state's external sovereignty effective, or, to express it differently, to enable the state to become a juristic person of international law. *United States* v. *Hutchings*, 2 Wheeler Cr. Cas. 543, Fed. Cas. No. 15,429; Holland, Lectures on International Law, Walker's Ed., 1933, p. 91; 1 Oppenheim, International Law, 4th ed. 1928, § 71 p. 143; 1 Louter, Le Droit International Public Positif [1920], p. 218; Visscher, Les Gouvernements etrangers en Justice, Revue de Droit International, Ser. III [1922], v. 3, p. 149; Ullmann, Trattato di Diritto Internazionale Pubblico,

tr. by Buzzati, 1914, § 30, p. 184. Recognition clothes a *de facto* state with an international status (*Salimoff & Co.* v. *Standard Oil Co.*, 282 N. Y. 220, 227) and confirms the self-existence of such state (Zeffter, Le Droit International de l'Europe, Bergson's trans. [1883] p. 61). It implies a formal engagement to respect the rights and powers of sovereignty in the new state and to accept its form of government as adequate to express its rational and normal will.

"In recognizing the state, we consequently recognize its legislative capacity; we accept its legislation, both statutory and consuetudinary, as defining the laws of its national existence sufficiently for international purposes." (1 Lorimer, The Institutes of the Law of Nations [1883] 325.)

Recognition, moreover, clothes the state recognized with international capacity to enter into diplomatic relations and to conclude treaties (1 Oppenheim, op. cit., § 75*d*, p. 15 and accepts the validity and efficacy of the acts of the recognized state—be those acts executive, legislative, or judicial—and it impresses upon them a retroactive effect from the commencement of the existence of such state or government. Thus, the Supreme Court has said in *Oetjen* v. *Central Leather Co.* (246 U. S., 303), that "recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence." In *Underhill* v. *Hernandez* (168 U. S. 250, 253), the Court said:

"If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation."

The same principle has been accepted by tribunals of respectable authority in other countries. In England, the House of Lords in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* [1933] A. C. 289, decided that—

"The effect of such recognition is retroactive and dated back to the original establishment of Soviet rule which was in the 1917 October Revolution, as was held by the Court of Appeals in Aksionairnoye Obschestve *A. M. Luther* v. *James Sagor & Co.*"

In France, the Civil Tribunal of the Department of the Seine in *De Mayenne* c. *Jeutel*, 55 Clunet, 710 [1926] held that—

"the effect of the *de jure* recognition of the Union of the Soviet Socialist Republics, except as it attempts to take away vested rights, is retroactive and goes back to the day of the commencement of the juridical existence of the new government."

Protected by the retroactive effect of recognition are also legislative (*Murray* v. *Vanderbilt*, 39 Barb. 140, 146) and executive (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Monte Blance Real Estate Corp.* v. *Wolvin Line*, 145 La. 563, 85 S. E. 242) acts of confiscation.

We must take judicial notice of the recognition of the Soviet Government by our Government on November 16, 1933 (*Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *Amer. Metal Co.*, 246 U. S. 304; *City of Berne* v. *Bank of England*, 9 Ves. 347,

32 Repr. 636; *Mighell* v. *Sultan of Jehore* [1894], 1 Q. B. Div. 149, 158, 161, A. C.; *Duff Development Co.* v. *Govt. of Kelantan* [1924], A. C. 797, H. of Lords), and applying the foregoing principles to the state of facts before us, we are bound by the determination of our political department regarding the international legal status of the Soviet Government; that recognition having been accorded, we must accept the Soviet Government as a legitimate governmental authority in Russia, and its institutions and laws as adequate expressions of the national will to meet the requirements of international law; that the effect of the recognition of that Government is to retroact upon and validate for international purposes all the acts, whether legislative, executive, or judicial, of that Government, including the decrees by which the property and assets of the respective insurance companies were affected from October 1917, when that Government came into power.

But, as each nation can legislate only for itself (The Antelope, 10 Wheat. 66, 122), to hold, as we must, that the recognition of the Soviet Government is retroactive, and that its actions are validated, in our judgment, does not answer the question on which these cases necessarily revolve, namely, whether the legislation of the Soviet Government, as it affects these insurance companies, should be recognized and applied by our courts, so as to vest in the Soviet Government, title to the assets of the corporations, located here, and thus enable that government to assign such title to the United States as it purports to do. That question is not free from intrinsic difficulties, and the studied views of those who have considered and written on the subject, and the obiter dicta of the courts as they have had occasion to comment on it, are far from being in agreement. Realizing that for the first time, perhaps, in the judicial history of this country, the courts have been called upon by a foreign power, with whom we are now in relations of amity, to give extraterritorial effect with respect to property located here, to its admittedly confiscatory legislation, requires that we approach the subject with caution. That the legislation of each State is local in character and has no force proprio visore, beyond its jurisdiction, is a principle flowing from and in entire harmony with the dominant conceptions of political science in every land. In the case of The Apollon (8 Wheat. 362, 370) [1824], Mr. Justice Story said:

"The laws of no nation can justly extend beyond its own territory, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons upon whom the legislature have authority and jurisdiction."

This general principle has been followed down to the present time without any material variation. *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 536; *Huntington* v. *Attrill*, 146 U. S. 659, 689; *Hilton* v. *Guyot*, 159 U. S. 113, 163; *Second Russian Ins. Co.* v.

Miller, 297 Fed. 404 (C. C. A. 2). It is also accepted in the English courts (*Sedgwick Collins & Co.* v. *Russian Ins. Co.* [1925] 1 K. B. Div. 1, 15). The principle is given even a more rigorous application with respect to foreign laws or judgments which are contrary to morals, to public policy or prejudicial to local interest (*Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378), or are of a penal character (*Baglin* v. *Cusenier*, 221 U. S. 580; *Huntington* v. *Attrill*, 146 U. S. 657, 667; Wharton, A Treatise on the Conflict of Laws, 2d Ed. [1881] §4).

But, within the sphere of sovereignty enacting it, that legislation is effective to regulate fully the status of all persons and things therein, and to determine the juristic effect of every act or relationship done or established under it. To the full force of this principle, the respective insurance companies had to yield their unqualified assent. They came into being under the laws of an imperial sovereign; they lived many years under the imperium of those laws; and in 1918 a new sovereign power, the legitimacy of which has been explicitly accepted by our government, cut short their lives; it took over their corpus—their properties and assets. Such was the fate of these corporations in territories subject to Russian jurisdiction. As to the fate of the branches of these corporations here, the problem is not simple, for there the acts of the Russian Government may clash with local conceptions of private international law or policy.

That the continuity and conditions of juristic personality depend on the pleasure of the legislator who creates it, may safety be admitted. 9 Holdsworth, A History of English Law [1926] p. 48.

In *Canada Southern R. Co.* v. *Gebhard* (109 U. S. 527, 537), the Supreme Court said:

"Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to make it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

And there is no reason why the suppression of a juristic person by the legislative act of a sovereign which created it, should be regarded by the courts of other countries as contrary to their public policy. The fortune that betakes a corporation under the law which created and controlled it, betakes in like measure the branch offices both at home and abroad. The reason for this is that a branch office is nothing more, in the eyes of the law, than a prolongation of the life of the foreign corporation, without independent juristic existence of its own. This is the posture taken on repeated occasions with regard to the branch offices of these extinct Russian corporations, by

the courts of Poland (Affaire de *Julien Muszkat* c. *Soc. d'Assur. Rossia* [1929], Supt. Ct., 58 Clunet, 770, 771); France (*Banque generale pour de Commerce etranger* c. *Jaudon* [1924] Trib. civ. Seine, 52 Clunet, 419, 420; *Cie. Nord de Moscou* c. *Phenix Espagnol* [1928] Cour d'Appel, Paris, 56 Clunet, 119, 130; *Soc. Vairon et Cie.* c. *Banque de Commerce de Siberie* [1928] Sirey, Rec. Gen., Jour. du Pal., 161, Cour d'Appel, Bordeaux); and Switzerland (*Banque internazionale de Commerce de Petrograd S. A.* [*Succursale de Geneve*] c. *Hausner* [1924] Trib. Federal, 52 Clunet 488). It is also the position taken by the British courts in *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [1923], 2 K. B. 682, C. A. Scrutton, L. J. And in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* [1933] A. C. 289, Lord Wright said:

"English courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. * * * But as the creation depends on the act of the sovereign state which created them, the annulment of the act of creation by the same power will involve the dissolution and nonexistence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact."

The same rule was recognized in *Russian Reinsurance Co.* v. *Stoddard, Jr., Supt. of Ins.*, 240 N. Y. 149, 154. But the Court of Appeals of New York, in recent cases, seems to have adopted what may be called the organic theory of juristic personality in opposition to the fictional theory which to this day has held a predominant position in the field of legal philosophy and judicial history and is the theory of our own law. Thus in *Petrogradsky M. K. Bank* v. *National City Bank* (253 N. Y. 23, 28 [1930], the court said:

"We think the plaintiff is not dissolved, but is still a juristic person with capacity to sue."

In *Severenoe Securities Corp.* v. *London & Lancashire Ins. Co. Ltd.* (255 N. Y. 120, 122 [1931]), a Russian corporation, whose juristic personality was in dispute, was declared to retain "a pallid life as the shade or little more of its former self." *In Matter of People* (Russian Reinsurance Co.) (255 N. Y. 415, 425 [1931]), the Russian corporations were declared to be "still juristic persons." In *Salimoff & Co.* v. *Standard Oil Co.* (262 N. Y. 220, 225 [1933]) in speaking of Russian banking and insurance corporations, the court observed that

"* * * corporations nonexistent in Soviet Russia have been, like fugitive ghosts endowed with extraterritorial immortality, recognized as existing outside its boundaries. The juristic person, the Russian corporation, dead in the country which created it, has received juridical vivification elsewhere."

This reasoning in the cases referred to coming before the court of appeals prior to the recognition of the Soviet Government, might

have some theoretical justification, on the ground, possibly, of the technical continuity of the ancient Russian regime (*Rome* v. *Himely*, 4 Cranch. 272; *Gelston* v. *Hoyt*, 3 Wheat. 246; Re Ambrose Light, 25 Fed. 412) and the presumed illegality of the new (*Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 224), a view, however, which has not passed unchallenged by high authority (*Banque Internationale de Commerce de Petrograd S. A.* [*succursale de Geneve*] c. *Hausner* [1924], Trib. Federal, Switzerland, 52 Clunet, 488). But that the logic of these cases should be extended, as is pretended (*Vladekavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378), to acts whose legality we have tacitly approved when we recognized the Government under whose authority they were done, is clearly a breach of the comity which one nation owes another. So singularly frail is the foundation of such reasoning when applied after an act, e. g., recognition which necessarily must alter the judicial application of legal theories, that the New York Court of Appeals stands alone on this proposition. In thus holding, it goes against the current of authority and controlling principles of public international law which nations in relation to mutual friendliness must observe toward each other. Considering the matter as a question of fact—i. e., failure of proof of extinction—and not of legal theory, as the New York courts have done, the House of Lords of England held in 1925 that banking corporations were not dissolved by Russian nationalization decrees of December 14, 1917 (*Russian Commercial & Industrial Bank* v. *Comptoir d'Escopte de Mulhouse* [1925], A. C. 112, 134, L. H.; *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [1925], A. C. 150, H. L.).

Passing from the imponderables of juristic theory—corporate personality—to its ponderables—corporate assets—we invoke, in a truer and broader sense, the application of principles of public and private international law which must be made to coexist and to cooperate toward the adoption of a policy of substantial justice.

A practical result of the political sovereignty of each country is the right of each to change its political institutions at discretion, and to legislate concerning its own interests according to its convenience and needs. Sec. Webster, Jan. 12, 1852; *King of Prussia* v. *Kuepper's Admr.*, 22 Mo. 550 [1856]; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 83.

Thus, in the exercise of the right accorded to every state by the most widely accepted of all the principles of the law of nations, the Soviet Government nationalized the business of insurance in which these companies were engaged, and confiscated their property. No doubt exists that the operation of the laws of a foreign state often transcend, and necessarily so, their territorial orbit of action. What gives them force in other jurisdictions is the comity between nations which calls on the representatives of each sovereign state to observe a mutual respect in considering the effects of such of their official acts as project themselves into a foreign jurisdiction. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Second Russian Ins. Co.* v. *Miller*,

297 Fed. 404, 409 (C. C. A. 2); *Hilton* v. *Guyet*, 159 U. S. 113, 163; *Sedgwick Collins & Co.* v. *Rossia Ins. Co.* [1926], 1 K. B. 1, 17, C. A. And, as a general rule, the acts of the recognized government when invoked by litigants in the forum of a friendly nation, will not be permitted to be impeached. "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U. S. 250, 252. The reason, of course, is that to permit the validity of those acts to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 304.

Two possible grounds exist for refusing to give the Soviet decree extraterritorial application. One is public policy; the other is its penal character—assuming it is penal. The conception embodying the idea of public policy is wrapped in considerable vagueness as is generally admitted. *Hadden* v. *Barney*, 5 W. 11, 107; *Egerton* v. *Brownlow*, 4 H. L. Cas. 1, 123. The view expressed concerning public policy by these, the highest tribunals of England and the United States, warn against the danger of taking uncertain and unsatisfactory concepts as the deciding yardstick according to which the legislation of the recognized government of Russia is to be accepted or rejected in our courts. Considerations of an international character urge us to accept, with great reluctance, a local conception of public policy as the determining factor in the relations between friendly nations. Is the confiscatory legislation of a recognized government, which produces effects only within its own jurisdiction, and respecting its own nationals or foreigners, per se, against public policy? Certainly not. Speaking of the confiscatory legislation of the State of Georgia in 1782, which expropriated the property of British loyalists, and particularly that of Wright, the provincial governor, during our Revolutionary period, the Lord Chancellor of England, as far back as 1788, said in *Wright* v. *Nuss* (1 H. Blackstone 136, 149, 126 Repr. 83, 89):

"It may be a question for private speculation, whether such a law made in Georgia was a wise or an improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an independent country, and the laws of every country much be equally regarded in courts of justice here, whether in private speculation they are wise or foolish."

This original principle has been accepted without question in subsequent adjudications involving our own national and nationals of the country putting such legislation into effect. *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Murray* v. *Vanderbilt*, 39 Barb. 140, 146.

Is such legislation against public policy if it seeks extraterritorial application? Gratuitous expressions in the courts of New York, England, and France, give the impression that they would hold—

if the occasion arose—that any infringement of the right of private property, which operates upon property situated in those jurisdictions, would be against their public policy.

But in close analysis, it will be found that many of these expressions were unnecessary to the decision of the actual question before the courts and they do not apply to the specific problem before us. The cases there referred to concern the protection of rights acquired locally, such as the payment of debts, the enforcement of contracts, and the right of succession under the local law, all of which come properly under the operation of well established principles of private international law. On the other hand, there is much authority in the decisions to the effect that there is nothing in the confiscatory legislation of a recognized government which can be against the public policy of the recognizant State, even when the legislation of the former is judged exclusively according to the local conceptions of the latter rather than by general standards. While there is a divergence of opinion on the question whether the Soviet decrees of nationalization are contrary to public policy, it is well to bear in mind the admonition of the Supreme Court in *Hedden* v. *Berney*, *supra*, against the practice of permitting judicial tribunals to decide according to their uncheeked discretion what should be the public policy of a nation, particularly on a question of international concern. The known practice of the executive department of the nation pronouncing the public policy of the nation should be controlling upon the courts in such instances.

The public policy of the country may be declared in the Constitution and, if that instrument is silent, the three departments of the Government have the power within their respective spheres to declare what the public policy is; the executive, by proclamation or some other authoritative act; the legislative, by statute; the judiciary, by judicial decisions. The chief executive, acting as the constitutional organ of international relations, may declare, in the course of the administration of the affairs of the Nation, its public policy with respect to any question within his legitimate competency. The act of recognition of a foreign government may import the equivalent of a definite declaration of policy which the courts would be bound to notice. Should we for any reason disapprove of the policies of a foreign government which seeks our recognition, we would be within our rights in declining to recognize it on that ground solely. In *A. M. Luther* v. *James Sager & Co.* [1921] (3 K. B. 532), it appears that the Soviet Government had been extended de facto recognition by the British Government. It was contended that the confiscatory decrees of that government were in their nature "so immoral, and so contrary to the principles of justice" as recognized in England, that the courts should disregard them, Lord Serutton saying:

"Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the courts could investigate the title without infringing the comity of nations. But

it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will."

While we have said that recognition is retroactive and that its effect is to preclude the tribunals of the recognizant State from questioning the validity or legality of the actions of the government recognized, and that it invalidates, so far as concerns the tribunals of the recognizant State, transfers of property and other transactions which before recognition would have been treated as invalid by those tribunals (1 Oppenheim, International Law, 4th Ed. [1928] § 75d, p. 155; Hervey, The Legal Effects of Recognition in International Law [1928] 82, 87), an important qualification of this general principle must be formulated, and that is, that as in the interregnum between the establishment of a foreign government in power and its recognition by this Government, it cannot be said to be entitled to any comity and its legislation to any respect (*Rose* v. *Himely*, 4 Cranch, 272; *Gelston* v. *Hoyt*, 3 Wheat. 246) at our hands during such period whatever has been done in the courts, with legal finality, must be regarded as res judicata and valid as against the world. So that in establishing a new policy or changing an old one, the act of recognition must be understood to have effect only from the date it actually takes place as to questions which are res judicata and irrevocable, but as to questions which are still pending or not affected with litigation, or which are political in nature, the effect must be understood as from the commencement of such government. Therefore, during the interregnum, the corporations were correctly regarded here (because of the refusal of our courts on grounds of public policy to give effect to the Soviet legislation), as a juristic person, and as such subject to the application of the principles of private international law, the most frequently invoked in these Russian cases having been the lex rei situs and the lex loci contractus. *Salinoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220; *Sedgwick Collins & Co.* v. *Rossia Ins. Co.* [1926] 1 K. B. 1; *In re Russian Bank for Foreign Trade* [1933] Chancery 745; *Egger* v. *La Balóise-Vie* [1924], Triv. civ. Seine, 52 Clunet, 1006.

In any litigation between private individuals putting in opposition the laws of respective countries the conflict must be resolved according to the rules of private international law. The principle which during such interregnum applied to the branch offices of these corporations in this country, was clearly formulated in the Treaty on International Commercial Law of Montevideo [1889] (art. 6) as follows:

"The branches or agencies established in a State by a corporation domiciled in another, shall be considered as domiciled in the place where they do business and subject to the jurisdiction of the local authorities regarding the business which they may do."

Under this qualification of the general principle of the retroactivity of the act of recognition, the rights which the Soviet Government acquired here with respect to these companies and their assets under

the decree of nationalization must date only from the date of actual recognition—that is, November 16, 1933; but as to what occurred before, the rights of the Soviet Government must be understood as subordinate to and regulated by the principles of private international law to the extent which those principles govern the rights of our nationals or inhabitants acquired under our laws in the course of business with the companies prior to actual recognition. Anything adjudicated by our courts subsequent to the date of actual recognition must, therefore, be treated as void.

When, therefore, the Soviet Government was recognized, the courts lost all right to continue to inject their prerecognition conceptions of public policy into the international panorama in manifest derogation of the express determination of the political department and the clear juridical implications of the act of recognition. As said by Lord Scrutton, L. J. in *A. M. Luther v. James Sagor & Co.*, *supra:*

"But it appears a serious breach of international comity, if a State is recognized as a sovereign independent State, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the sovereign through his ministers, and not of the judges in reference to a State which their Sovereign has recognized. The English courts act on the rule 'that an intention to take away the property of a subject without giving him a legal right to compensation for that intention is expressed in unequivocal terms': *Central Control Board* v. *Cannon Brewery Co.* If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the State, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility of recognition or nonrecognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges."

The Russian decrees extinguished the lives of these companies and appropriated their property and general assets. If those decrees were effective to extinguish their lives abroad as well as at home, why should it not be effective also to take over their property and assets abroad where the companies had branches, to as full an extent as at home, if our political department has made a public declaration of policy with respect to such legislation which validates

it, and the rights of those who have claims against the corporations are safeguarded by our courts under the qualification of the principle of retroaction indicated and the established principles of private international law? When, then, our Government recognized that of Russia, it also recognized its legislation. By that legislation, the Government of the Soviets ended the lives of these corporations and took over their assets. That legislation this court is bound to recognize and apply since November 16, 1933, as to matters res judicata, in as full a measure as our political department has recognized it, and we are foreclosed from further questioning it by the very act of recognition. Recognition changes a policy of official disfavor into an attitude of graceful acquiescence. To impeach this legislation now in the courts as being against our public policy would clearly trench upon the sphere of the executive who has already decided the matter in a manner that concludes our courts.

As to the question whether the Russian decree is of a penal character, I do not hesitate to say that I cannot so regard it. A statute is penal if it inflicts a penalty for the violation of some of its provisions (*Huntington* v. *Attrill* (1893), A. C. 150, 156, H. of L.; 3 Bourvier's Law Dictionary, 3rd ed. by Rawle, 1914 p. 2551), or, if it fixes upon a wrongdoer any extraordinary liability in favor of the person wronged, not limited to the damages suffered (*Huntington* v. *Attrill*, 146 U. S. 657, 667). It is evident that the reported cases do not indicate that they are vitiated with the criminal or tortious elements which these definitions involve. In *Baglin* v. *Cuzenier* (221 U. S. 580) and *Lecouturier* v. *Roy* (1910) (A. C. 262) which have been cited by counsel as authority against the retroactivity of the supposedly confiscatory legislation of the French Government, must be considered in the light of the French law—the Loi relative au contrat d'association, of July 1, 1901, 63 Bull. des Lois, 12 c. ser., II Sem. (1901), pt. princ., p. 1273)—art. 19 of which provides: "The provisions of art. 463 of the penal code shall apply to offenses contemplated by the present law."

That law clearly fell within the terms of the first portion of our definition.

The right of the United States to sue in the national court has been questioned on the ground that the balances claimed by appellant are now, as it is alleged in process of adjudication in the State courts, and the majority opinion turns upon this question. To uphold the jurisdiction of the State courts, and avoid giving extraterritorial effect to the Soviet decrees, the majority opinion has taken the unwarranted position that the effect of the dissolution of the insurance company upon its assets was to debase the sovereignty of the State to the status of the corporation. The majority opinion reads: "Consequently we must for present purposes take the Soviet Government to have become to all intents and purposes the Russian insurance corporation in Russia which owned the deposit in New

York subject to the fulfillment of the conditions upon which the deposit was made with the New York Superintendent of Insurance."

This position, of course, reverses law, logic, and fact. It reverses law because the dissolution of the corporation and the nationalization of its property did not lower the Soviet Government to the plane of the private litigant without its express consent; it reverses logic, because such dissolution did not assimilate the Russian Government with a corporation which was legally nonexistent; and it reverses fact because such nationalization could not involve a debasement of sovereignty. On the contrary, the dissolution and nationalization had the effect of absorbing the assets of the corporation into the rest of the public assets and placing them beyond the reach of the processes of the tribunals of foreign states. Art. 3, § 2 of the Constitution, says: "the judicial Power shall extend * * * to Controversies to which the United States shall be a Party."

Section 41 of the Judicial Code gives the district courts original jurisdiction of

"All suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue."

The Government is clothed with full juristic capacity to come into its own courts, either as a party plaintiff or an intervenor, to protect or claim its lawful rights. Of this there can possibly be no doubt. But it is said that since the State courts first acquired jurisdiction and control over the res, the United States courts lack authority, under the doctrine of jurisdictional priority repeatedly announced by the Supreme Court (*Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 88; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *Wabash R.* v. *Adelbert College*, 208 U. S. 38; *Farmers Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 61; *Byers* v. *McAuley*, 149 U. S. 608, 614; *Merritt et al* v. *Amer. Steel-Barge Co.*, 79 Fed. 228 [C. C. A. 8]), to entertain these suits and to proceed therein as prayed. To this general principle which, as has been said, is a principle "of right and law, and therefore, of necessity," (*Covell* v. *Heyman*, 111 U. S. 176, 182), and "essential to the dignity and just authority of every court" (*Buck* v. *Colbath*, 3 Wall. 334), I, of course, subscribe. But I perceive no conflict between this salutary rule and the suits brought by the United States in its own courts, if the principles of the retroactivity of recognition and the extraterritoriality of the legislation of a foreign government within the limits already indicated, are regarded in the proper light, and in that light applied to the questions before us.

Upon matters which were res adjudicata on November 16, 1933—the date of recognition of the Soviet Government—under principles of private international law underlying questions of this character, such recognition can have no disturbing effect; upon matters which were pending or not decided with the authority of finality on the date of recognition and which involved the properties or assets of na-

tionalized Russian companies not affected with the application of principles of private international law, it is clear that whatever was done in the State courts was done at the risk of a declaration of nullity, for the courts should have known that they were dealing with the properties or assets of a foreign government whose confiscatory legislation we have approved by the very fact of recognition and by taking an assignment comprising in many instances the fruits of such legislation. Therefore, on the date of recognition the State courts lost jurisdiction and control of the properties and assets in question. The United States was at liberty to proceed in its own courts, without ousting the State courts of jurisdiction, or, of delaying or obstructing the State courts in the exercise of their jurisdiction, or of leading to a conflict of authority between the Federal and the State courts (*Merritt* v. *American Steel-Barge Co.*, 79 Fed. 228 [C. C. A. 8]). In other words, and as a limitation to the principle of jurisdictional exclusion on the grounds of priority, the "possession of the officer of court" was discharged (*Buck* v. *Colbath*, *supra*) by the act of recognition, as to those matters or claims not affected with the application of principles of private international law. It was, therefore, within the competency of the district courts to entertain the suits filed and to issue the injunctive relief prayed by the United States, since § 265 of the Judicial Code, which forbids the Federal courts "to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy", must be construed in connection with § 262 which authorizes the Federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 228. It may not be maintained that, if after November 16, 1933, the State courts lost jurisdiction over the assets of the recognized Russian Government, any injunction issuing from a court of the United States would act to stay proceedings in any court of the State within the meaning of the statute. No proceedings can be stayed, no ousting of jurisdiction or custody can occur, no delay or obstruction in the exercise of jurisdiction can take place, no conflict of authority can happen, where lawful jurisdiction is wanting by operation of law.

The decree should be reversed.

United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the city of New York, on the 27th day of May, one thousand nine hundred and thirty-five.

Present: Hon. MARTIN T. MANTON, Hon. AUGUSTUS N. HAND, Hon. HARRIE B. CHASE, Circuit Judges.

UNITED STATES, PLAINTIFF-APPELLANT

vs.

GEORGE S. VAN SCHAICK, AS SUPERINTENDENT ETC., DEFENDANT-appellee

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a mandate issued to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

(Endorsement on cover:) United States Circuit Court of Appeals second circuit. *United States* vs. *George S. Van Schaick, Superintendent, etc.* Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 27, 1935. William Parkin, clerk.

United States of America, Southern District of New York

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 156, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of United States, plaintiff-appellant, against Louis H. Pink, Superintendent, etc., defendant-appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 27th day of June, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and fifty-ninth.

[SEAL] WM. PARKIN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1935

158 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILE COPY

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No. 197

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

BANK OF NEW YORK AND TRUST COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

LOUIS H. PINK

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to re-

view the judgments of the Circuit Court of Appeals entered in the above cases on May 27, 1935.

OPINIONS BELOW

The opinion of the District Court in the *Bank of New York* and the *Manhattan Company cases* is reported in 10 F. Supp. 269. The opinions of the Circuit Court of Appeals are not as yet officially reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 27, 1935. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

Section 24 of the Judicial Code, as amended, c. 231, 36 Stat. 1087, 1091 (U. S. C., Title 28, Sec. 41), provides in part as follows:

> The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * *.

QUESTIONS PRESENTED

1. Whether Soviet decrees dissolving Russian insurance corporations, appropriating their assets and terminating all rights of creditors and stockholders therein, were effective to transfer to the

Soviet Government title to New York assets of such corporations in excess of amounts required for payment of claims arising out of business transacted by such corporations in the United States.

2. Whether the assignment executed in favor of the United States on November 16, 1933, by the Soviet Government (See exchange of letters between President Roosevelt and Maxim Litvinoff, People's Commissar for Foreign Affairs, Union of Soviet Socialist Republics, dated November 16, 1933, Official Publication of the Department of State, Eastern European Series No. 1, pages 13–15) was sufficient to transfer to the United States such assets of the Soviet Government.

3. Whether the action in the State court is an action *in rem* or an action *in personam,* within the rule respecting priority of jurisdiction between Federal and State courts; and even if the State court action is *in rem,* whether that action to which the United States is not a party can defeat the jurisdiction of the Federal court to adjudicate the title of the United States to these assets.

4. Whether Section 24 (1) of the Judicial Code requires the Federal courts to entertain an action in which the United States seeks to recover property claimed by it.

STATEMENT

United States v. *Bank of New York and Trust Company,* the action in which the full opinions of the Circuit Court of Appeals for the Second Cir-

cuit were written, was an action in equity instituted in the District Court for the Southern District of New York for an accounting and to compel the defendant bank to pay over to the United States as the assignee of the Union of Soviet Socialist Republics the funds formerly belonging to Moscow Fire Insurance Company, a corporation organized under the laws of the Imperial Government of Russia. These funds had been turned over to that bank as an agent or depositary of the Moscow Fire Insurance Company in April 1933 by the Superintendent of Insurance of the State of New York under an order of the Supreme Court of the State of New York which provided that the funds should be withdrawn only on the order of a court of competent jurisdiction. These funds, amounting to $1,080,399.54, were the surplus of the assets of the United States branch of this corporation remaining after payment of the claims of its creditors arising out of domestic transactions.[1] In 1925 the funds had been taken into the custody of the Superintendent of Insurance of New York under orders of the New York state courts. Those proceedings, insofar as they related to these funds, were terminated by the order directing the deposit in the

[1] Section 27 of the New York Insurance Law requires foreign insurance corporations, as a condition precedent to doing business in New York, to make a deposit of a certain amount with the Superintendent of Insurance. This deposit, the statute provides, shall be for the "general benefit and security of its policyholders and creditors within the United States."

bank. *Matter of People (Northern Ins. Co.)*, 255 N. Y. 433. Thereafter, in April 1933, a separate action was instituted in the Supreme Court of the State of New York in which plaintiffs were Moscow Fire Insurance Company and Paul Lucke, its surviving director, and in which the defendants were the Bank of New York and Trust Company, as depositary of the funds, and other persons who might have claims against the corporation, either as creditors arising out of foreign transactions, or as stockholders, and in effect seeking an accounting and final settlement of the funds. The funds remain in the depositary bank, although claims have been allowed by a judgment entered on a referee's report which would, if paid, substantially exhaust the funds.

The United States filed its bill of complaint on August 22, 1934, prior to the entry of the above-mentioned judgment. In this bill the United States alleged that in 1918, by decrees of the Soviet Government, Moscow Fire Insurance Company had been dissolved, and all of its right, title, and interest and all the right, title, and interest of all of its stockholders in its property, including the deposit hereinbefore mentioned, were appropriated by the Soviet Government; and that on November 16, 1933, on the occasion of the recognition of the Soviet Government by the United States Government, the Soviet Government had assigned to the United States certain claims against American nationals, including the property in the United States formerly owned by Moscow Fire Insurance

Company. The bill was dismissed by the District Court on the grounds: (1) that the assignment to the United States did not include these particular funds, and (2) that the decrees of the Soviet Government were ineffective to transfer to the Soviet Government title to such assets in the United States, inasmuch as their confiscatory character was contrary to public policy. The Circuit Court of Appeals affirmed the orders of the District Court, not on either of the above grounds and not on the merits, but on the sole ground that prior to the institution of the action in the federal court the funds had been taken into the custody of the New York state court and hence that an action could not be maintained in the federal court which would disturb that custody.

In *United States* v. *President and Directors of the Manhattan Company,* the history of the funds involved is substantially the same as that in the *Bank of New York case,* up to the point when the liquidation proceedings by the Superintendent of Insurance were terminated, and the funds paid to the defendant bank under a similar order of the New York Supreme Court. In the *Manhattan Company* case that deposit was made on November 14, 1933. Thereafter the Northern Insurance Company of Moscow, which had been the owner of the funds, made an assignment of them to the defendant bank as assignee for the benefit of creditors under the New York Debtor and Creditor Law, and the defendant bank was holding the funds as

such assignee at the time the action by the United States in the federal court was commenced. In this case the only proceedings in the State court after the making of the deposit were proceedings instituted by the bank for the determination of claims against the insurance company in accordance with the applicable provisions of the Debtor and Creditor Law. In this case the depository bank, as assignee, has received other funds on behalf of the corporation which at no time have been in the possession of the Superintendent of Insurance. The total of the amounts held by the bank is $332,994.05.

In *United States* v. *Louis H. Pink, Superintendent of Insurance of the State of New York,* the facts are again similar to those in the *Bank of New York case,* so far as concerns the origin of the funds and the taking over of them by the Superintendent of Insurance. In this case, the surplus funds of the First Russian Insurance Company, established in 1827, amounting to $1,170,783.35 (less certain payments made since the bill was filed), are still in the possession of the Superintendent of Insurance. He had satisfied all creditors whose claims arose out of domestic transactions, but had not paid over this surplus for the account of the insurance company at the time when the United States instituted this action in the federal court.

The orders of the District Court in *United States* v. *President and Directors of the Manhattan Com-*

pany and in *United States* v. *Louis H. Pink, Superintendent of Insurance of the State of New York*, were affirmed by the Circuit Court of Appeals for the Second Circuit on the authority of *United States* v. *Bank of New York and Trust Company*.

SPECIFICATION OF ERRORS TO BE URGED

The United States urges that the Circuit Court of Appeals erred:

1. In holding, in the *Bank of New York* and *Manhattan Company* cases, that after the termination of the actions brought by the Superintendent of Insurance to effect payment of creditors whose claims arose out of domestic transactions, and after all such creditors had been paid in full, the State Court retained jurisdiction over the funds in controversy, in view of the fact that by Soviet law the funds had, prior to this time, become the property of the Soviet Government.

2. In holding in the *Bank of New York* and *Manhattan Company* cases that if the Supreme Court of the State of New York had previously acquired exclusive jurisdiction and control over the funds in controversy, it did not relinquish such exclusive jurisdiction and control over the said funds by virtue of its orders that the funds be deposited in the defendant banks, subject to the further order of *any* court of competent jurisdiction.

3. In holding in the *Pink case* that if the State Court acquired jurisdiction over the funds in controversy in 1925, it did not lose such jurisdiction

after the payment of all claims for which the assets of the corporation had been pledged, since by Soviet law that portion of the assets of the corporation not required for this purpose had previous to that time become the property of the Soviet Government.

4. In holding in all three cases that if the State Court had previously acquired jurisdiction over the surplus assets of these corporations after payment of all claims for which these assets had been pledged, it did not on November 16, 1933, lose such jurisdiction, because such surplus became the property of the United States, and because the United States has not consented to be sued respecting such property.

5. In holding in all three cases that the State Court retained exclusive jurisdiction and that it did not on November 16, 1933, lose such jurisdiction over the surplus assets, since the recognition of the Soviet Government by the United States required the State Court to give effect to the Soviet decrees terminating the existence of the corporate plaintiff and the directorship of the individual plaintiff in the *Bank of New York case,* terminating the existence of the corporate assignor in the *Manhattan Company* case and the authority of any persons to make an assignment on its behalf, and terminating the existence of the corporation in the *Pink* case and vesting its assets in the Soviet Government.

6. In holding that the state court action in the *Bank of New York* case and the proceeding in the *Manhattan Company* case, are actions *in rem* within the rule respecting priority of jurisdiction between Federal and State Courts.

7. In holding in all three cases that the actions brought by the United States were actions *in rem* within the rule respecting priority of jurisdiction between Federal and State Courts.

8. In holding that the United States was not entitled under Section 24 (1) of the Judicial Code to maintain actions in the Federal court to recover property to which it asserts title.

9. In holding in all three cases that the Federal court lacked jurisdiction to determine the title of the United States to the funds.

10. In failing to hold that the surplus assets in question became the property of the United States by virtue of the Soviet decrees of 1918 and the assignment by the Soviet Government.

11. In affirming the judgments of the District Court.

REASONS FOR GRANTING THE WRITS

The court below has held that a federal court is without power to entertain an action by the United States to recover, in an action in equity for an accounting, property to which it has derived title by an assignment from a friendly foreign power, on the ground that a state court has previously acquired jurisdiction over this property in an action

in rem. In so holding on the foregoing ground it has affirmed orders of the District Court based upon a holding that the assignment under which the United States claimed these funds did not include them and that the Soviet decrees which terminated the respective corporations and vested in the Soviet Government their assets and the claims of all their creditors and stockholders to such assets were ineffective to transfer to the Soviet Government title to these funds, since they were located in New York.

(1) The funds were the property of the Soviet Government and are now the property of the United States. Both sovereigns and their property are immune from suit without their consent, and neither sovereign had consented to the actions in the state court. Even if the state court could acquire jurisdiction of the property of a then unrecognized foreign sovereign without its consent, we submit that upon recognition and the concurrent transfer of the funds to the United States, the New York Supreme Court lost all power to deal with these funds.

The ruling of the Circuit Court of Appeals is also to the effect that the mere pendency of an action in a state court which, that court has held, has assumed jurisdiction *in rem* over the same property can defeat the jurisdiction of the federal court to adjudicate the title of the United States to these assets. This constitutes an interpretation of Section 24 (1) of the Judicial Code at variance

with the decisions in *United States* v. *McIntosh,* 57 F. (2d) 573 (E. D. Va., 1932) and *United States* v. *Inaba,* 291 Fed. 416 (E. D. Wash., 1923), which held that under this section federal courts must entertain an action instituted by the United States to recover its property despite the pendency of an action in a state court respecting the same property.[2] That when property which it claims is already the subject of litigation, a remedy is open to the United States other than participation in the pending litigation, has been stated by this court in the following language in *United States* v. *Lee,* 106 U. S. 196, 222:

> Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr* v. *United States,* already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction

[2] These two cases also held that a Federal Court may issue an injunction *pendente lite* to protect this property despite pending proceedings in the State court respecting such property.

> may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.

The decision of the court below is at variance with this settled principle. It leaves open to the United States, as the only means of asserting its rights to this particular property, to enter its appearance in the pending actions in the State court. So to limit the rights of the United States is in practical effect in these cases to subject the United States to suit without its consent.

If the State court is not prevented from making any determination in the premises whatsoever by reason of the sovereign character of the property before it and the immunity of the United States from suit, it is at least prevented from making a complete determination. In these circumstances, we submit that this Court should determine whether the State court actions are of such a character that the custody assumed to have been taken by that court deprives the Federal court of jurisdiction to grant the relief which the United States seeks. Cf. *United States* v. *Lee, supra.*

The decision of the court below is that the State court has at all times had exclusive jurisdiction and control over these funds here in question. We believe that, even if the State court did at one time have such jurisdiction or control, it lost that con-

trol when it relinquished the funds and ordered the deposit to be made with the Bank of New York and the Manhattan Company as agents and depositaries of the insurance companies, and under instructions to pay out upon the order of "a court of competent jurisdiction." Within the meaning of this order, the Federal court, or another State court, might order the banks to pay out the funds. Had the Supreme Court of the State of New York intended to retain its exclusive jurisdiction and control over the funds, it undoubtedly would not have framed its order in such a way that in the future another court might make an order directing a payment of the funds. It follows, therefore, that when the State court ordered the deposits made in the banks, that court thereby lost its exclusive jurisdiction or control.

It did not subsequently reacquire such exclusive jurisdiction or control by virtue of any actions or proceedings now pending in the State court. Prior to the institution of any subsequent proceedings in the State court, all right, title, and interest in the surplus assets remaining after domestic creditors had been paid were appropriated by the Soviet Government, which at all times thereafter, and until November 16, 1933, remained the owner thereof. The Soviet Government as the owner has never consented to its property being subjected to the jurisdiction of the State court, and without its consent its rights therein cannot be adjudicated. Consequently the State court did not acquire any

jurisdiction, *in rem* or otherwise, by virtue of the later proceedings instituted therein. *Wulfsohn* v. *Russian Republic,* 234 N. Y. 372; see also *The Exchange,* 7 Cranch 116; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *Ricaud* v. *American Metal Co.,* 246 U. S. 304.

Further, it definitely appears that all three Russian insurance companies concerned herein—The Moscow Fire Ins. Co. which purported to maintain the later action against the Bank of New York and Trust Co., the Northern Ins. Co. of Moscow which purported to make the later assignment to the Manhattan Company for the benefit of creditors, and the First Russian Ins. Co. which claims the surplus assets in the hands of the Superintendent of Insurance—were nationalized and ceased to exist as Russian corporations, by virtue of decrees of the Soviet Government, prior to any and all proceedings now pending in the New York State courts. Thus, in one case there was no corporate plaintiff, in the second there was not any corporate assignor, and in the third there was no corporation which could claim the surplus assets in the hands of the Superintendent of Insurance. It therefore results that any proceedings purported to have been instituted by any of these nationalized Russian corporations could not have given the court any jurisdiction, *in rem* or otherwise, over the funds herein concerned.

Even if the State court did reacquire jurisdiction in the pending State court proceedings it is by no

means clear that such jurisdiction is *in rem* and not *in personam,* for in all three proceedings rights against the corporations themselves, and not against the fund as such, are being adjudicated.

Furthermore, it cannot necessarily be said that the instant suits by the United States are actions *in rem,* or that an adjudication of the rights of the United States by the Federal court would in any way interfere with any jurisdiction or control over the *res* by the State court. In the instant suits the United States is asking that the defendants account to it for any funds held by them and formerly belonging to the Soviet Government. Obviously, to allow the Federal court to pass upon the right asserted by the United States would not affect the State court proceedings. It may be that any judgment obtained herein by the United States would be required to be proved in the State court proceedings, but that does not mean that the United States has not sufficiently stated a cause of action in its bill of complaint in the Federal court, or that the instant suits should not be allowed to proceed to judgment.

In *Waterman* v. *Canal-Louisiana Bank Company,* 215 U. S. 33, 46, this Court said:

> If the Federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the

> court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in *Payne* v. *Hook,* 7 Wall. 425, *supra,* and *Ingersoll* v. *Coram,* 211 U. S. 335, *supra.*

It is believed that the court below misconceived the effect of this decision, and that its attempt to distinguish it is untenable. The duty of the defendant in each of the present cases is, like that of the executor in the *Waterman case,* to pay over the fund to the parties lawfully entitled thereto. The Federal court has jurisdiction to determine who those parties are. In *Riehle* v. *Margolies,* 279 U. S. 218, in holding that an action in a State court might be maintained to adjudicate a claim against a debtor, concurrently with a proceeding in a Federal court to distribute the debtor's assets, and that the judgment so obtained would be binding in the Federal court, this Court stated:

> The contention that the judgment is not conclusive rests upon the argument that, because the appointment of the receiver draws to the appointing court control of the assets, and in the distribution of them among creditors there is necessarily involved a determination both of the existence of the claim and of the amount of the indebtedness, the federal court must have the exclusive power to make that determination. The argument ig-

nores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. Insofar as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. Insofar as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 88–9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. *There is no inherent reason why the adjudication of the liability of the debtor in personam may not be had in some court other than that which has control of the res.* It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them. (Italics ours.)

The relief sought by the United States in the instant suits is similar to the relief sought by the plaintiff in *Riehle* v. *Margolies, supra.*

(2) Apart from the questions of local substantive law and prior jurisdiction involved, we submit that this Court should decide whether at the time of recognition by the United States, the Soviet Government owned the property which the United States claims has been assigned to it, and whether as a result of recognition our courts are required to give effect to that ownership. The assets assigned were placed in New York by the former Russian corporations for a special purpose, namely, as security for persons who entered into business transactions with them within the United States. This purpose has been fulfilled by the payment of such persons in full.[3]

By Soviet law, which is now conclusive on our courts as to the status of former Russian insurance corporations and their assets, the surplus funds here in question had been appropriated by the Soviet Government. If the decision of the District Court herein be correct, the United States Govern-

[3] The New York Court of Appeals in discussing the liquidation of the New York assets of the three Russian insurance companie here involved; stated as follows in *Matter of People* (*Russian Reinsurance Company*), 255 N. Y. 415, 427:

"The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors, it winds up a branch of such a business conducted within its borders and in submission to its laws. (*Matter of People* [*Norske Lloyd Ins. Co.*], 242 N. Y. 148.) This done, its duty ends except to turn the surplus over to a competent custodian (Insurance Law, section 63)."

ment would be rendered unable to recover in any court the funds of these or any other former Russian corporations assigned to it by the Soviet Government. Such a situation has a bearing on the diplomatic relations between the United States Government and the Soviet Government.

(3) The District Court has interpreted the diplomatic interchange between the United States Government and the Soviet Government in a manner at variance with the interpretation placed on it by both of the high contracting parties. The Circuit Court of Appeals has declined to review this interpretation, although in a prior case it had indicated its approval of the interpretation now urged by the United States (see *State of Russia* v. *National City Bank*, 69 F. (2d) 44). The meaning of these diplomatic documents should be finally determined by this Court, for until such determination has been made the United States is hampered in its attempts to carry out its agreement with the Soviet Government to collect Russian assets in the United States which are not the subject of prior litigation as well as such assets which, as in these cases, are claimed to have been taken into the custody of a court in a pending action.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JULY 1935.

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[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 195

UNITED STATES OF AMERICA, PETITIONER

v.

BANK OF NEW YORK AND TRUST COMPANY

No. 196

UNITED STATES OF AMERICA, PETITIONER

v.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

No. 197

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK

SUPPLEMENT TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

This memorandum supplementing the petition is intended to treat more fully certain points dealt with at length in the briefs of the respondents; and

to point out that the decision below is in conflict with a decision of the Sixth Circuit (p. 21, *infra*).

Respondents devote their briefs mainly to the merits of the cases, apparently conceding that if the property in question formerly belonged to the Soviet Government and now belongs to the United States, the state courts are without jurisdiction over that property.

Our opponents base their argument on the merits on two contentions:

1. That because of their confiscatory nature the Soviet decrees relied upon are contrary to our public policy and should not be given effect; and

2. That the claims in question were not embraced within the terms of the Litvinoff assignment.

It is important to bear in mind that in this entire matter there is not presented any question as to the rights of creditors arising out of domestic business.[1] All such creditors have been paid in full. The conflict is, in the main, between foreign creditors and the United States Government suing as the assignee of the Soviet Government.

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[1] The only unpaid claims which are alleged to have arisen in the United States, or in favor of United States nationals, are believed to be certain claims of attorneys for legal services to the defunct corporations. These claims are small in amount, and for purposes of the present petition may be disregarded.

I

AS TO THE EFFECT OF THE SOVIET DECREES

The funds here in question were originally a part of certain deposits made in New York by Russian insurance corporations as a condition precedent to doing business in New York, pursuant to the requirements of the New York Insurance Law (Section 27), which provided that the funds should be deposited for the "general benefit and security of its policyholders and creditors within the United States."

In August 1925 the Superintendent of Insurance of the State of New York took possession of the assets of the Russian insurance corporations in accordance with Section 63 of the Insurance Law of the State (Cons. Laws, chap. 28) to conserve them for the benefit of those entitled thereto. By that statute it was provided that the rights and duties of the Superintendent with reference to the corporations and their assets should be those theretofore exercised by and imposed upon ancillary receivers of foreign corporations in the State. Therefore, after the purpose of the deposit had been fulfilled, and policy holders and domestic creditors paid, it was the duty of the Superintendent of Insurance under the laws of New York [2]

[2] *Matter of People*, 238 N. Y. 147 (1924); 207 App. Div. 249 (1934); *Matter of People* (*First Russian Ins. Co.*), 255 N. Y. 415 (1931); *Matter of Second Russian Ins. Co.* (1926), 219 App. Div. 46; appeal dismissed, 244 N. Y. 606 (1927).

to transmit the surplus funds, if any, to the domiciliary liquidator, which here was the Liquidation Commission appointed by the Soviet decree (R. 62–63, *Bank of New York*).

It is submitted, therefore, that after the Superintendent had taken care of the policy holders and creditors, no further jurisdiction of the New York courts existed with respect to the surplus. As the highest court of the State of New York said in *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, 427:

> The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors, it winds up a branch of such a business conducted within its borders and in submission to its laws (*Matter of People* (*Norske Lloyd Ins. Co.*), 242 N. Y. 148). This done, its duty ends except to turn the surplus over to a competent custodian (Insurance Law, Sec. 63). * * * Russian directors, chosen by Russian shareholders in accordance with Russian law, must work out for themselves their problems of internal management. The surplus assets in this State are but a part of the total assets to be administered abroad. We disclaim a continuing duty of visitation and supervision. * * * We think the time is now at hand when the responsibility for the management of these foreign corporations should go back to the managing officers appointed by the shareholders. Our adminis-

trative machinery should be no longer clogged, our liquidator no longer burdened, our courts no longer vexed, with problems not our own.

Any rights in or to the said surplus were governed wholly by Russian law. Under Russian law, the Soviet Government became the owner thereof, and the Russian directors and shareholders ceased legally to exist. Having ceased to exist under the law that created them, they have ceased to exist everywhere. *Lazard Bros.* v. *Midland Bank, Ltd.* (1933), A. C. 289. In *Issaia* v. *Russo-Asiatic Bank,* 266 N. Y. 37, 43, the court referred to the Russo-Asiatic Bank as "a defendant who is dead."

Pursuant to the Russian decrees, ownership of the funds became vested in the Soviet Government, which has never subjected itself or its property to the jurisdiction of the New York courts.

No nation can be sued without its consent.[3] Nor can the property or personal rights of a sovereign be made the subject of litigation in the courts of another nation unless the foreign sovereign agrees to be a party to such litigation.[4] Whenever it appears in any litigation that the defendant, or a necessary or proper party in interest, is a foreign sovereign, the courts will decline to assume or re-

[3] *Exchange* v. *McFadden,* 7 Cranch 116, 137; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347.

[4] *Underhill* v. *Hernandez,* 168 U. S. 250, 253; *Ricaud* v. *American Metal Co.,* 246 U. S. 304, 310.

tain jurisdiction unless the foreign sovereign consents or subjects himself to the jurisdiction.[5] This is true whether or not the foreign nation has been recognized *de jure* by the country before whose courts the litigation is pending.[6]

It is well settled that our courts will take judicial notice of the factual existence of a government which has not been recognized by the United States.[7] Thus, it is established that a government *de facto* cannot be sued without its consent. The Russian Government, then a *de facto* government, was therefore held immune from suit.[8]

In the liquidation proceedings in the state court, it did affirmatively appear that the Soviet Government was a claimant to all assets of the former Russian insurance corporations, by virtue of the decrees enacted in Russia with reference thereto. (See opinion of Court of Appeals in *Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415, 420, 425.) That fact having appeared, the court was without further jurisdiction over the surplus assets of the Russian corporations, the foreign sovereign not having consented to such jurisdiction.

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[5] *Mighell* v. *Sultan of Johore*, C. A. L. R. (1894) 1 Q. B. D. 149.

[6] *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N. Y. 372 (1923); *Luther* v. *Sagor* (1921) C. A. 3 K. B. 532; *Princess Olga* v. *Weisz* (1929) C. A. 1 K. B. 718.

[7] *Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 301; *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 309.

[8] *Wulfsohn* v. *R. S. F. S. R.*, 234 N. Y. 372 (1923).

Our courts will, of course, take judicial notice of the recognition of a foreign government by the United States. When a recognition *de jure* of a government occurs, the recognition relates back to the time when the recognized government came into being. All the laws passed by the unrecognized government must be accepted as having been in full force from the time when they were promulgated.[9]

Thus, upon the recognition of the Soviet Government on November 16, 1933, our courts were required to give full force and effect to the decrees promulgated by the Soviet Government, including decrees whereby the insurance companies herein concerned were nationalized and all their property and assets, including the surplus funds here in question, were appropriated by the Soviet Government. It follows, therefore, that if the Soviet Government were in these actions now asserting its claim to the surplus funds in question, that claim would have to be admitted. Instead, the Soviet Government has assigned its claim to the funds to the United States Government, which now asserts the claim in its sovereign capacity.

It is submitted, therefore, that under well established principles of law the ownership of the Soviet Government of the surplus funds here in question

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[9] *Underhill* v. *Hernandez*, 168 U. S. 250, 253 (1897); *Republic of Peru* v. *Peruvian Co.* (1887), 36 Ch. Div. 489; *White, etc.* v. *Simmons* (1922), 127 L. T. R. 571 (N. S.), 581, 584; *Lazard Bros.* v. *Midland Bank* (1933), L. R. (A. C.), 289, 297 (H. of L.); *Williams* v. *Bruffy*, 96 U. S. 176, 186; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.

prevented the New York State courts from acquiring any jurisdiction over said surplus funds. Nor did the New York State courts thereafter acquire any such jurisdiction.

If, on any theory, it may be said that the New York courts acquired jurisdiction over the surplus funds here in question, it is submitted that at least on and after November 16, 1933, when the United States gave *de jure* recognition to the Soviet Government, any such jurisdiction over the funds here in question no longer existed.

Respondents apparently concede that if the funds in question formerly belonged to the Soviet Government and now belong to the United States, the state courts are without jurisdiction over the property. But they contend that the Soviet decrees, being confiscatory, are contrary to public policy and should not be given effect; and hence the funds in question at no time belonged to the Soviet Government. To this there are two answers.

1. Considerations of local public policy may not be invoked to subject to the jurisdiction of a local court the property of a foreign subject.

This Court has held that a substantive defense may not be disregarded on the ground of local policy. In *Bradford Elec. Co.* v. *Clapper*, 286 U. S. 145, the Court said (p. 160):

> A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired

> the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.

We submit that the same reasons apply in the instant case. If the courts of New York may dispose of the property of the Soviet Government, on the ground that they do not like the way in which the Soviet Government acquired that property, the result will be to subject a foreign sovereign to irremediable loss. The immunity of a sovereign rests on grounds of international comity, and should not be subjected to the varying notions of public policy entertained by local tribunals.

The executive branch of the Government, by the Chief Executive, has, in effect, declared what is the public policy of the United States with regard to the acts and decrees of the Soviet Government; and that declaration of policy has been tacitly approved by the legislative branch of the Government.[10] If the local courts may, as each sees fit,

[10] See Congressional Record, Vol. 78 (Jan. 11, 1934), pp. 460, 461, where, in the debate in the Senate, it is said that valid agreements have been "reached between the President and the representative of the Russian Soviet Union upon which the recognition of the Soviet Government is based", founded upon the exclusively "Executive function and prerogative to recognize foreign governments", and there was mentioned "the basis of contractual relationship upon which recognition has been granted * * *."

override the declared national policy by refusing, in effect, to carry out that policy, the consequences might be indeed serious. As was said by Chief Justice Taney in *Doe* v. *Braden,* 16 How. 635, 656:

> * * * it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered.

See also *Terlinden* v. *Ames,* 184 U. S. 270. That language is equally apt in the present situation. It would be impossible for the Executive to conduct our foreign relations if every local court was authorized to superimpose its views as to morals and public policy with respect to the title and right of a foreign sovereign to make a formal agreement and assignment to the Government of the United States.

As said by Lord Scrutton, L. J., in *Luther* v. *Sagor* (1921), 3 K. B. 532, 558:

> But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is "contrary to essential principles of justice and morality." Such an allegation might well with a susceptible foreign government become a *casus belli;*

> and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized. * * *

2. There is no "public policy", such as respondents assert, in regard to the actions of a foreign sovereign affecting its corporations and their stockholders and creditors.

Except in so far as the State where the transaction takes place may have exacted a pledge for the protection of local creditors, one who deals with a foreign corporation does so in peril of the domiciliary law. *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527.

One of the reasons that States commonly exact security for permitting the local transaction of certain kinds of business is the uncertainty of rights against the corporation as established by domiciliary law. New York State has exacted such security in the present cases, and we are here concerned only with the surpluses after satisfaction of all creditors within the scope of the protection thus afforded. We submit that there is no public policy of the United States or of the State of New York concerned with the manner in which rights of foreign creditors or stockholders are dealt with by the Soviet Government.

One of the respondents suggests (p. 10, *Bank of New York*) that the public policy of the State of New York, as distinguished from the national policy, is involved. This we challenge. The Court

of Appeals of New York has not purported to pronounce a fixed rule of local policy, but to express its views of national policy upon a matter of international concern.

It should be noted, moreover, that that court has recently modified its earlier views on the effect of Soviet decrees, in the light of recognition. In *Dougherty* v. *Equitable Life Assurance Society,* 266 N. Y. 71, the court stated (p. 83):

> In Russia, where all these insured were, with one or two exceptions, these decrees were laws to be obeyed. They were the laws of their government. As to them the Soviet Republic was no body of bandits, confiscating property, but an existing government, carrying out new theories of insurance. If the Russian people, under their Soviet form of government, determined to abolish all private insurance for their citizens and establish a system of social protection by the State, that was their affair, not ours, and however objectionable we may consider the monopolization of all business, including insurance and banking, and the conduct of it thereafter by the government, we at least must admit that other people can try the experiment if they desire.

If, and in so far as, there is involved herein any question of giving extraterritorial effect to the decrees of the Soviet Government, it is predicated upon the assumption that the New York courts and the courts hereinbelow were necessarily dealing

with property legally situated within the State of New York. There is, however, authority for the view that the property here in question is not conclusively to be deemed situated within the State of New York or the United States.

The deposits of the insurance companies in the State of New York consisted primarily of bonds evidencing municipal, state, or federal obligations. As such they were, of course, intangibles. These bonds, it is believed, have been sold and their proceeds are now on deposit with the respondents in the various actions. Deposits of this nature are likewise intangibles. Applying, therefore, the doctrine of *mobilia sequuntur personam,* it would seem to follow that these intangibles had their situs at the domicile of the former owners, namely, the former Russian insurance corporations, and that therefore they were at least constructively under the control of Russia at the time the corporate lives of the insurance corporations were terminated.

Under the holdings of this Court, such doctrine unquestionably would be true for purposes of taxation. By analogy, therefore, it would seem to follow that they are subject to transfer to the successor of the dissolved corporations in accordance with the law of Russia. See *Blodgett* v. *Silberman,* 277 U. S. 1, 3–4.

Intangibles are held to include municipal obligations (*Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204), stock certificates, United States bonds and

Treasury certificates of indebtedness, savings bank accounts, and life insurance policies (*Blodgett* v. *Silberman, supra*). The Court, in *Blodgett* v. *Silberman* stated (p. 9):

> At common law the maximum *"mobilia sequuntur personam"* applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the State of the domicil or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

Likewise, this Court, in *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84, 92, said:

> Thus, intangible personal property has been held to have a situs at the domicile of the owner, although intangibles ordinarily have no actual situs and the paper evidence of their existence may be elsewhere. *First National Bank* v. *Maine,* 284 U. S. 312, 328–329.

II

AS TO THE SCOPE OF THE ASSIGNMENT

Assuming that prior to the Litvinoff assignment title to the funds in question was in the Soviet

Government (otherwise the question would be academic), respondents nevertheless contend that the assignment did not, and was not intended to, include assets such as these. But respondents' briefs give no valid reason for thinking that the assignment meant less than it said. Their contentions are grounded upon a narrow and strained construction of the language of the instrument, and completely ignore certain parts thereof.

By the assignment there was assigned to the United States "the amounts admitted to be due or that may be found to be due it [the Soviet Government], as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, * * *." (R. 42, *Bank of New York and Trust Company.*)

Respondents contend that the agreement must be interpreted in the same manner as contracts between individuals. But, as Judge Manton stated in his dissenting opinion below:

> The ultimate design of the two countries in executing this assignment was to transfer "the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America, and the claims of their nationals", to the broad plane of diplomacy, and by placing those claims beyond the reach of vexatious judicial action, to facilitate at one stroke, the adjustment of the delicate points at issue

between the two countries. No narrow or strained construction of that instrument is permissible under these circumstances.

This assignment was a part of the general scheme of recognition. In such an arrangement it was obviously impractical, if not impossible, to itemize all assets and claims covered thereby. Instead, broad general language, assigning *all* claims of the Soviet, was used, in order that claims such as these might be included. General language does not necessarily create ambiguity, but is often used, as here, to prevent ambiguity and avoid further dispute.

That a broad interpretation of the assignment was intended, is also shown by the fact that the Soviet Government thereby renounced its right to sue American nationals who may be indebted to it. Respondents' argument is, in effect, that, although the Soviet Government renounced its right to sue on the claims here in question, it still did not intend to assign the claims to the United States Government. This would mean that neither the Soviet Government nor the United States Government would be in a position to assert these claims. Such a situation obviously was not intended.

The Circuit Court of Appeals for the Second Circuit in *State of Russia* v. *National City Bank of New York* (1934), 69 F. (2d) 44, 48, considering the scope of the Litvinoff assignment, stated that "* * * it is apparent that the intent was /

to assign all the claims of the Soviet Government to the United States."

III

AS TO JURISDICTION [11]

We submit that the doctrine of priority of jurisdiction is in no way applicable to the situation herein presented. That doctrine is applicable only where one court has assumed the jurisdiction of a *res* and another court thereafter attempts to deal with the *res,* ousting the prior jurisdiction of the other court.

For several reasons the doctrine is not applicable herein:

(a) We submit that the New York State courts never acquired any jurisdiction over these surplus funds. It cannot necessarily be said that the custody taken by the Superintendent of Insurance, pursuant to order of the Supreme Court of the State of New York, was the custody of the court. When the Superintendent took possession of the property which formerly belonged to the insurance companies, he did so in his capacity as a member of

[11] We do not maintain (as respondents seem to think) and do not have to maintain that the Federal courts have exclusive jurisdiction of actions by the United States. We do maintain that the United States has its choice of forums, and that its sovereign immunity applies to its property as well as to its "person", and prevents it from being compelled to enter any forum against its will. No action *in rem* (if such these be) can deprive it of its right to decide when and where it will litigate its rights.

the executive branch of the state government.[12] The possession was his, not the court's which issued the order. Although the New York Insurance Law provides that he can only act under order of the court, there is nothing in the law to indicate that his possession is equivalent to the custody of the court.

(b) But, assuming the court thereupon acquired custody of the *res*, that court did not acquire any jurisdiction to adjudicate rights or title to the surplus funds, due to the fact that the said funds then belonged to a foreign sovereign which at no time subjected itself or its property to the jurisdiction of the court.

(c) Furthermore, as pointed out in petitioner's main brief, even if the state court did acquire juris-

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[12] In *Farrell* v. *Stoddard*, 1 F. (2d) 802, 803 (1924) (N. D. N. Y.), the court stated as follows:

> An examination of section 63 of the Insurance Law of the state of New York makes it clear that the superintendent of insurance is a public officer in the executive department of the state government, and that he still retains his character as a public officer when he acts as liquidator of insurance companies under the provisions of this statute. His power to act as custodian of the res comes alone from the statute. The judicial power cannot change or modify this statute, or affect his power in any respect whatever. True, the defendant must first apply to the court for an order to act as liquidator. That, however, merely means that the court must give the signal to start the machinery under which the superintendent, the agent of the executive power, acts. Thereafter the defendant, as the representative of the executive power, pays no heed to the court or its mandates. His chart is the statute under which he acts.

diction and custody of the *res,* it lost its control thereof when it relinquished the funds and ordered the deposit to be made to the Bank of New York and Trust Company and the Manhattan Company, as agents and depositaries of the insurance companies, under instructions to pay out only upon the order of "a court of competent jurisdiction."[18]

(d) But even if the state court acquired and retained jurisdiction and control until November 16, 1933, it clearly lost any jurisdiction over the property on and after that date, when title vested in the United States as assignee of the Soviet Government, to which the United States accorded *de jure* recognition on that date.

Consequently, even if the present suit by the United States be deemed a suit *in rem,* there is no conflict with any *existing* jurisdiction *in rem* in the state court.

(e) But, as shown in petitioner's main brief, the present suits (for an *accounting*) instituted by the United States are not suits *in rem,* but *in personam.*

In *Brown* v. *Duffin,* 13 F. (2d) 708 (1926) (C. C. A. 6th), the court was dealing with a procedural

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[18] It is to be noted that the deposit of the funds in the Bank of New York & Trust Co., and the Manhattan Company, subject to court order as noted above, was an *alternative* to relinquishing the funds to the surviving directors themselves. *Matter of People* (*Northern Ins. Co.*), 255 N. Y. 433, 435. Had the latter course been adopted, it certainly could not be said that thereafter the state court still maintained its custody and control of the *res.*

situation similar to that herein, and held that an action for accounting is not an action *in rem*.

It may be that any decree herein, adjudicating title to the funds in question to be in the United States, would thereupon have to be proved and enforced in proceedings in the state court. But the rendition of such a decree would involve no interference or conflict with any jurisdiction *in rem* that may heretofore have been assumed by the state court.

We submit that the asserted distinction of *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, is untenable. It is argued that in that case the executor had a personal liability, whereas in this case the depositary has no such personal liability. We submit that so far as personal liability is concerned the depositary here is in no better position than was the executor there. The present suits are *in personam*, even though any rights adjudicated herein may have to be satisfied out of a *res* in the possession of the state court. Substantially the same situation existed in the *Waterman* case.

(f) Respondent Bank of New York and Trust Company contends (brief, pp. 3, 5, 7) that the proceeding now pending in the state court is a supplement and continuation of the original liquidation proceeding instituted and carried out by the Superintendent of Insurance, and therefore is a proceeding *in rem*. Even assuming (contrary to *Farrell*

v. *Stoddard, supra*) that the state court acquired custody and control of the property by virtue of the liquidation proceedings instituted by the Superintendent of Insurance, nevertheless, under New York law the Superintendent's authority in the liquidation ended when he had paid the domestic creditors and policyholders. Hence the theory upon which respondent contends that the pending proceeding is *in rem,* fails.

For the above reasons, we submit, the doctrine of priority of jurisdiction is not applicable.

The decisions herein below are in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Brown* v. *Duffin, supra,* in which it was held that an action for an accounting is not an action *in rem,* within the rule respecting priority of jurisdiction.

In *Brown* v. *Duffin* an accounting suit was begun in the state court. Thereafter a receivership proceeding was instituted in the Federal court. It was held that the state court action, being *in personam,* did not interfere with the receivership proceeding in the Federal court. The court stated as follows (p. 710):

> There is, however, a third class of suits, in which, though the custody of property is not essential to attain the object of the suit, yet during the progress of the case such custody may become necessary or desirable, as collateral to the full measure of relief,

> which was primarily sought in personam. These cases are only inchoately in rem, and the exclusive jurisdiction dated either from the actual taking of possession, or, at the earliest, from some specific request that the court do take possession. We put the Brown state court case in this class. It did not ask that the court seize any property. *A judgment in equity that defendant first account, and then pay over, is a judgment in personam.* Yet it showed a body of property with the trustees, for which a receivership might well be later advisable, and the prayer for general relief would have supported such a result. Hence it was, up to the time of filing the federal bill, a suit in personam, and did not bar the general jurisdiction of the federal court. (Italics ours.)

In the instant cases the court below has held that these actions for accounting are actions *in rem* and that the rule of priority of jurisdiction is therefore applicable, and that the state court proceedings preclude the suits at bar.

It is respectfully submitted that the writs of certiorari should be granted in order that this conflict may be resolved.

STANLEY REED,
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Special Assistant to the Attorney General.

OCTOBER 1935.

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FILE COPY

Nos. 195, 196, and 197

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

BANK OF NEW YORK AND TRUST COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the District Court (No. 195, R. 80) in the Bank of New York and the Manhattan Company cases is reported in 10 F. Supp. 269. The

opinions of the Circuit Court of Appeals (No. 195, R. 89; No. 196, R. 53; No. 197, R. 56) are reported in 77 F. (2d) 866, 880, 881.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 27, 1935 (No. 195, R. 109; No. 196, R. 70; No. 197, R. 73). The petition for writs of certiorari was filed July 1, 1935, and was granted October 14, 1935. The jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix hereto, *infra*, pp. 85–89, including the following:

Section 24 of the Judicial Code, as amended (U. S. C., Title 28, Section 41);
Section 27, New York Insurance Law;
Section 63, New York Insurance Law;
also, the assignment by the Soviet Government to the United States Government, dated November 16, 1933.

QUESTIONS PRESENTED

1. Whether Soviet decrees dissolving Russian insurance corporations, appropriating their assets, and terminating all rights of creditors and stockholders therein, were effective to transfer to the Soviet Government title to New York assets of such

corporations in excess of amounts required for payment of claims arising out of business transacted by such corporations in the United States.

2. Whether the assignment executed by the Soviet Government in favor of the United States, on November 16, 1933, was sufficient to transfer to the United States such assets of the Soviet Government.

3. Whether the actions in the State court, and the instant suits in the Federal court, are actions *in rem* or actions *in personam* within the rule respecting priority of jurisdiction between Federal and State courts; and even if the State court actions and/or the Federal court actions are actions *in rem*, whether the State court actions, since they involve rights in property of a sovereign, can defeat the jurisdiction of the Federal court to adjudicate the title of the United States to these assets.

4. Whether Section 24 (1) of the Judicial Code requires the Federal courts to entertain an action in which the United States seeks to recover property claimed by it.

STATEMENT

The Russian insurance corporations whose assets are involved in this litigation had conducted business in the United States for many years prior to the Soviet Revolution in Russia, in November, 1917. They had made with the Superintendent of Insurance of the State of New York or with other trustees in New York the deposit of assets required

by Section 27 of the New York Insurance Law as a condition precedent to doing business in that State.[1] As a result of the situation of these companies caused by the Soviet Revolution, a number of actions were instituted in the courts of New York by persons purporting to act on behalf of these and other Russian insurance corporations doing business in New York,[2] seeking the recovery from the Superintendent of Insurance or from other trustees, of that portion of these deposits not required to respond to claims of persons within the protection of Section 27 of the New York Insurance Law.[3] In order to overcome the uncertainties connected with the New York business of these corporations, caused by this litigation and by the extinguishment of the corporate life of these corporations by the laws of Russia, the Superintendent of Insurance, in 1925 and 1926, pursuant to orders of the Supreme Court of New York, in accordance

[1] The text of this statute is included in the Appendix to this brief, p. 85, *infra*.

[2] The Russian insurance companies doing business in New York, other than those whose assets are herein involved, were Russian Reinsurance Co. and Second Russian Insurance Co.

[3] *Andre* v. *Beha*, 211 App. Div. 380, aff'd, 240 N. Y. 605; *First Russian Insurance Co.* v. *Beha*, 240 N. Y. 601; *Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149.

For an extended discussion of the history of the New York business of these and other Russian insurance corporations prior to 1925, see opinion of Referee Donnelly in the consolidated actions in the New York Supreme Court, *Moscow Fire Insurance Co. et al.* v. *Bank of New York & Trust Co. et al.*, and *Morro et al.* v. *Moscow Fire Insurance Co. et al.*, contained in Record, Bank of New York & Trust Co., pp. 53–71.

with Section 63 of the New York Insurance Law,[4] took possession of all the assets of these corporations situated in New York. These orders included injunctions against the prosecution in New York of actions against these corporations or their assets. The Superintendent employed these assets, together with the assets already in his possession pursuant to the requirements of Section 27 of the New York Insurance Law, in paying claims of creditors of these corporations whose claims arose out of transactions of the companies in New York, i. e., those persons whom the New York courts in previous decisions had held entitled to reach similar assets of foreign insurance corporations. *Matter of People (City Equitable Insurance Co.)*, 238 N. Y. 147; *Matter of People (Norske Lloyd Insurance Co.)*, 242 N. Y. 148.

The subsequent history of the liquidation of the New York assets of the companies herein concerned is set forth in the following brief statements relating to each.

UNITED STATES *v.* BANK OF NEW YORK & TRUST CO. (MOSCOW FIRE INSURANCE CO.)

After the Superintendent had completed the liquidation of claims entitled under the above-mentioned decisions to satisfaction out of the assets in his possession, and acting pursuant to court order (R. 50–56),[5] he turned over the surplus assets of

[4] The text of this statute is included in the Appendix to this brief, p. 86, *infra*.

[5] All references to the Record relate to the Record in the case of Bank of New York & Trust Co., unless otherwise indicated.

the Moscow Fire Insurance Co., consisting of cash and securities having a value of $1,080,399.54 on April 18, 1933, to the Bank of New York & Trust Co., the defendant herein, as agent and depositary of Moscow Fire Insurance Company, and Paul Lucke, as surviving director and conservator of said company, upon a stipulation that this fund was not to be withdrawn except upon the order of a court of competent jurisdiction. This deposit was made pursuant to an order of the New York Supreme Court (R. 23–26) entered upon the remittitur of the New York Court of Appeals subsequent to its decisions in *Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415, and *Matter of People (Northern Insurance Co.)*, 255 N. Y. 433.

On April 19, 1933, and June 23, 1933, respectively, two actions[6] were commenced in the Supreme Court of New York to which the parties were the Bank of New York & Trust Co. (the respondent herein), Paul Lucke, as surviving director and conservator of Moscow Fire Insurance Company, and various persons who asserted claims against this company, either as creditors or as stockhold-

[6] These actions were entitled, respectively, *Moscow Fire Insurance Co. et al.* v. *Bank of New York & Trust Co. et al.*, and *Morro et al.* v. *Bank of New York & Trust Co. et al.* The complaint in the former action is contained in the Record herein, pp. 12–16; the Referee's opinion in both actions is contained in the Record, pp. 53–71.

ers, which actions had for their object the determination of the disposition of the assets in the possession of the bank and the satisfaction of the various claims out of these assets. These actions were later consolidated and referred to a referee to hear and determine. (R. 58.)

On August 22, 1934, a judgment was entered on the referee's report, making the following disposition of the funds in the possession of the defendant herein, which at that time consisted of cash in the sum of $1,136,879.54 (R. 59):

$436,879.54 set aside to meet claims of creditors of the company, including not only those who had appeared to assert their claims, but also those who might later appear and assert claims (R. 71). (The record contains no indication that there are any other persons who might assert claims against the unawarded portion of this fund.)

$700,000 to be distributed pro rata to shareholders at the rate of $70 per share for each of the 10,000 shares outstanding (R. 71). The referee's report (R. 70) states that 6,500 shares of 10,000 shares outstanding were represented in the actions before him.

Thirteen claims of creditors were allowed for a total of $206,950.64. (R. 71.) These claims may be classified as follows:

(a) Claims based on policies issued in Russia, and payable in Russia, in Russian rubles;

(b) Claims of corporations of foreign countries other than Russia based upon contracts with or

agency services performed for the company both before and after its dissolution in Russia;

(c) A claim for personal services in Russia pursuant to an employment contract in rubles made with the company prior to its dissolution;

(d) Claims for personal services including legal services rendered to the company outside of Russia subsequent to its dissolution, including a claim of $60,000 of Paul Lucke, the surviving director.

The amount in the possession of the defendant herein not ordered to be distributed to designated individuals, namely, $579,928.90,[7] was directed by the judgment of 1934 to be retained by the Bank of New York & Trust Co. against further claims of creditors and stockholders which might in the future be presented.

The United States filed its bill of complaint in the instant action on August 22, 1934, the same day on which was entered the judgment on the referee's report in the pending State court actions, as described above.

In its bill the United States alleged that in 1918, by decrees of the Soviet Government, Moscow Fire Insurance Company had been dissolved and all its right, title, and interest and all the right, title, and interest of all of its stockholders in its property, including the deposit hereinbefore men-

[7] $436,879.54 set aside to meet claims of creditors, and expenses of the actions, less $206,950.64 awarded to specific claimants, plus $350,000 set aside for stockholders who had not appeared in the actions.

tioned, were appropriated by the Soviet Government; and that on November 16, 1933, on the occasion of the recognition of the Soviet Government by the United States Government, the Soviet Government had assigned to the United States certain claims against American nationals, including the property in the United States formerly owned by Moscow Fire Insurance Company. The bill was dismissed by the District Court on the grounds: (1) that the assignment to the United States did not include these particular funds, and (2) that the decrees of the Soviet Government were ineffective to transfer to the Soviet Government title to such assets in the United States, inasmuch as their confiscatory character was contrary to public policy. The Circuit Court of Appeals affirmed the orders of the District Court, not on either of the above grounds and not on the merits, but on the sole ground that prior to the institution of the action in the Federal court the funds had been taken into the custody of the New York State court and hence that an action could not be maintained in the Federal court which would disturb that custody. This Court granted certiorari on October 14, 1935.

UNITED STATES *v.* PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY (NORTHERN INSURANCE CO. OF MOSCOW)

In this action the history of the funds in the possession of the defendant, is substantially the same as in the *Bank of New York & Trust Company* case

up to the point when the liquidation proceedings by the Superintendent of Insurance were terminated, and the funds paid to the defendant bank, under an order that they were not to be withdrawn except upon the "order of a court of competent jurisdiction."

This deposit, consisting of cash and securities valued at $245,307.60, was made on or about August 3, 1933 (Manhattan Co., R. 7–15), and was received by the defendant herein as agent and depositary of Northern Insurance Company of Moscow, pursuant to an order of the Supreme Court of New York (Manhattan Co., R. 23–25) dated June 6, 1933, entered on the remittitur of the New York Court of Appeals following its decision in *Matter of People* (Northern Insurance Company of Moscow) 262 N. Y. 453.

On November 13, 1933, the New York Supreme Court made an order directing the defendant herein to deliver all funds of Northern Insurance Company of Moscow in their possession as agent and depositary, to the defendant herein as assignee for the benefit of creditors of Northern Insurance Company of Moscow (Manhattan Co., R. 26–27), and thereafter the defendant herein received, as assignee for the benefit of creditors, assets valued at $249,815.03[8] (Manhattan Co., R. 12). The de-

[8] The difference between this amount and the amount of $245,307.60 mentioned above, results from a revaluation of certain of the assets received and the receipt of additional assets not specified in this record.

fendant herein received these assets as assignee pursuant to an assignment for the benefit of creditors made on behalf of Northern Insurance Company of Moscow, on May 6, 1932. After the receipt of these assets by the defendant herein nineteen persons filed claims with the defendant herein as assignee, for a total amount of $271,723.22 (Manhattan Co., R. 12).

On or about May 25, 1934, the defendant herein, as assignee, filed a petition and account in the Supreme Court of New York (Manhattan Co., R. 13). On July 7, 1934, that court made an order directing that the petition and account of the defendant as assignee be referred to a referee for the purpose, among other things: (1) to take and state the account of the assignee, and to hear any objections in respect thereto; and (2) to take proof and report as to all claims of creditors filed with the assignee (Manhattan Co., R. 28–29).

The referee had not rendered a final report prior to the commencement of the instant action by the United States, on August 25, 1934 (Manhattan Co., R. 13). The bill of complaint in this action (Manhattan Co., R. 2–5) contains in general the same allegations as the bill of complaint in the *Bank of New York & Trust Company* case. Thereafter the history of the instant action i. e., the proceedings in the courts below, is the same as that of the action *United States* v. *Bank of New York & Trust Company.*

The history of the funds in the possession of the defendant herein, comprising the surplus assets of the First Russian Insurance Company, is again similar to those involved in the *Bank of New York & Trust Company* case, and the *President and Directors of the Manhattan Company* case, so far as concerns the origin of the funds, the taking of possession of them by the Superintendent of Insurance, and their employment for the payment of claims against the Company, based upon domestic transactions.

The surplus ($1,393,196.42) remaining after the payment of such claims has been retained by the Superintendent pursuant to orders of the Supreme Court of New York (Pink, R. 37–47), on the basis of the decision of the Court of Appeals in *Matter of People* (*Russian Reinsurance Company*), 255 N. Y. 415, for the purpose of paying claims against the Company based upon transactions not connected with the business of the company in New York. Such claims have been in litigation in the State courts of New York since 1931, when the above mentioned decision was rendered. Certain payments on account of these claims have been made by the Superintendent, but the greater portion ($1,170-783.36) of the surplus assets was still in the possession of the Superintendent (Pink, R. 10) when the United States filed its bill of complaint in this

action against the Superintendent, on November 14, 1934 (Pink, R. 4–6).

An order was made by the District Court on December 20, 1934, (Pink, R. 50) granting a motion of the defendant to dismiss the complaint for insufficiency, and denying complainant's motion for an injunction *pendente lite*. No opinion was rendered. Thereafter the United States appealed to the Circuit Court of Appeals, and the appeal was prosecuted in conjunction with the appeals in the two companion cases, as recited herein above.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In the *Bank of New York* and *Manhattan Company* cases, in holding that after the termination of the actions brought by the Superintendent of Insurance to effect payment to creditors whose claims arose out of domestic transactions, and after all such creditors had been paid in full, the State court retained jurisdiction over the funds in controversy,—in view of the fact that by Soviet law the funds had, prior to this time, become the property of the Soviet Government.

2. In the *Bank of New York* and *Manhattan Company* cases, in holding that if the Supreme Court of the State of New York had previously acquired exclusive jurisdiction and control over the funds in controversy, it did not relinquish such exclusive jurisdiction and control over the said funds by virtue of its orders that the funds be deposited

in the respondent banks, subject to the further order of *any* court of competent jurisdiction.

3. In the *Pink* case, in holding that if the State court acquired jurisdiction over the funds in controversy in 1925, it did not lose such jurisdiction after the payment of all claims for which the assets of the corporation had been pledged,—since by Soviet law that portion of the assets of the corporation not required for this purpose had previous to that time become the property of the Soviet Government.

4. In all three cases, in holding that if the State court had previously acquired jurisdiction over the surplus assets of these corporations after payment of all claims for which these assets had been pledged, it did not on November 16, 1933, lose such jurisdiction,—because such surplus became the property of the United States, and because the United States has not consented to be sued respecting such property.

5. In all three cases, in holding that the State court retained exclusive jurisdiction and that it did not on November 16, 1933, lose such jurisdiction over the surplus assets, since the recognition of the Soviet Government by the United States required the State court to give effect to the Soviet decrees terminating the existence of the corporate plaintiff and the directorship of the individual plaintiff in the *Bank of New York* case, terminating the existence of the corporate assignor in the *Manhattan Company* case and the authority of any person to

make an assignment on its behalf, and terminating the existence of the corporation in the *Pink* case and vesting its assets in the Soviet Government.

6. In the *Bank of New York* and *Manhattan Company* cases, in holding that the State court actions are actions *in rem*, within the rule respecting priority of jurisdiction between Federal and State courts.

7. In all three cases, in holding that the actions brought by the United States were actions *in rem* within the rule respecting priority of jurisdiction between Federal and State courts.

8. In all these cases, in holding that the United States was not entitled under Section 24 (1) of the Judicial Code to maintain actions in the Federal court to recover property to which it asserts title.

9. In all three cases, in holding that the Federal court lacked jurisdiction to determine the title of the United States to the surplus funds.

10. In all three cases, in failing to hold that the surplus assets in question became the property of the United States by virtue of the Soviet decrees and the assignment by the Soviet Government to the United States.

11. In all three cases, in affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

I

The funds involved in the instant suits are the residue of deposits which were originally made

for the general benefit and security of domestic policyholders and creditors of Russian insurance companies which were subsequently dissolved. Such claims have been satisfied and the funds should have been turned over to the domiciliary liquidator of the companies.

(a) The State which creates a corporation has the power to destroy such corporation. Likewise, the State which creates a corporation controls the relationship existing between the corporation and its stockholders and creditors. Russia therefore had unquestioned power to dissolve Russian insurance corporations and to destroy their obligations to stockholders and creditors; and, having undertaken so to do, these corporations must be considered as non-existent and their obligations ended.

Where a statute provides that upon dissolution of a corporation its assets should pass to a designated individual, that individual can bring suit in his own name to acquire possession of the assets. In this case, the Russian Government constituted itself the statutory successor of the dissolved Russian insurance companies. We think it clear that by the rule of conflict of laws, the title which Russia acquired to these assets should be recognized in the courts of this country.

(b) Recognition is exclusively an executive act. It is retroactive in its effect and validates all the acts and decrees of the government recognized, from the commencement of its existence. The Soviet Government having been recognized by the United

States on November 16, 1933, it follows that its acts and decrees must be given effect in our courts. Included in the decrees so validated are those which dissolved the Russian insurance corporations, and transferred the property and assets of such corporations to the Russian state.

(c) The recognition of the validity and effect of the decrees of confiscation upon intangible property located in the United States is not opposed to the public policy of the United States. The question involved is primarily one of conflict of laws. The United States is not necessarily seeking to give extraterritorial effect to the Soviet decrees, but asserts that under our own law title to intangibles located in this country depends upon the laws of the domicile of the owner, which in these cases is, admittedly, Russia.

The public policy of this country is not concerned with the manner in which the Russian Government deals with its own corporations, their stockholders and foreign creditors. Where the conflicts law is well settled, this country is not concerned as to the manner in which title passes, so long as it accords with the domiciliary law. (The English courts follow this doctrine.)

The United States has brought suit in its own courts to enforce claims assigned to it in the course of diplomatic negotiations, and as a part of an executive agreement with a foreign government. It would be strange if it could be met with a defense that its claim was against its own public policy.

We think in matters of this nature, the executive branch of the Government determines the public policy of the United States, both because it conducts the foreign relations of the United States, and also because it alone may institute suits on behalf of the sovereign. Obviously, any public policy to be considered in the instant cases would be that of the United States, and not that of the State of New York.

(d) It does not mean that extraterritorial effect, as a legal proposition, is being given to the laws of Russia when our courts apply our own rule of law that title to intangibles located here is to be determined by the laws of Russia, the domicile of the owner. The maxim *mobilia sequuntur personam*, which has been applied by this Court on a number of occasions in respect of intangibles, is here applicable. Therefore, subsequent to the payment of the claims of domestic policyholders and creditors, the courts of New York in the pending actions were undertaking to enforce obligations arising not out of the laws of that State, but out of the laws of Russia, the domicile of the debtor.

(e) In enforcing obligations arising under foreign law, our courts will enforce no greater obligation than exists by that law at the moment suit is brought. Nor can that obligation be enlarged by the fact that the creditor happens to catch his debtor here. Since no enforcible right existed in Russia, at the time the State-court actions were instituted, no right existed here. The mere fact that

assets are located here, does not give rise to a cause of action.

(f) The cases upon which the respondents have heretofore relied are not applicable to the situation in the instant cases.

II

The assignment of the claims in question is contained in an exchange of letters between President Roosevelt and Maxim Litvinov, official representative of the Soviet Government.

(a) By this exchange of letters, Russia, preparatory to final settlement of claims between the two Governments, agreed not to take any steps in pending litigation or to institute new litigation in our courts to enforce claims of that Government against American nationals, and assigned to the United States all sums either due or which might be found to be due it as successor of prior Russian governments, or otherwise, from American nationals. The language of the assignment is broad and inclusive, and should receive a liberal interpretation. Otherwise, an anomalous situation would be presented, wherein the Soviet Government, having free access to our courts, agreed not to invoke the aid of such courts for the purpose of collecting claims which were not assigned. Certainly there was no intent to be read into the assignment that claims of this character are merely to be abandoned.

(b) The interpretation placed upon the assignment by the parties to the agreement should con-

trol. The United States has evidenced its understanding by the institution of these suits, in which action the Soviet Government has acquiesced. The rule applicable to the interpretation of treaties should be applied to this assignment, and it should be interpreted so as to carry into effect the intent of the parties.

III

The instant cases were dismissed upon the ground that the State court had acquired prior jurisdiction of the funds in question, which the court below held to constitute a *res*, that the instant suits were also actions *in rem*, and that therefore the District Court did not have jurisdiction to entertain such suits. If the State courts, however, did not have jurisdiction, or if the instant suits are not *in rem*, or if independently of these facts the United States has a right to resort to its own courts for the purpose of determining its title, the court below should be reversed.

(a) The United States has a right to bring an original action in its own courts for the purpose of determining title to property which it claims. Such jurisdiction was expressly conferred upon the District Courts by Section 24 of the Judicial Code, as amended. We submit that such jurisdiction, expressly conferred, is not defeated merely because a State court may have assumed jurisdiction over the same property in a pending action. Were it otherwise, the United States in many instances might be compelled to appear as a party defendant

in a State court action in order to protect its right to property, the title of which was in litigation in a State court action. As the United States may not appear as a defendant in a State court action, to deny it the right to have its claim adjudicated in the Federal court would be to deprive the Government of its day in court.

(b) The instant suits for an accounting are not suits *in rem,* but are suits *in personam.* This Court has held that an action of a similar character may be maintained notwithstanding the fact that the custody of the *res* was in a State court. Furthermore, we intend that the pending proceedings in the State courts are actions *in personam.*

(c) In order to determine if the State courts possessed jurisdiction of the *res,* it is necessary to determine first if the funds in question were the property of a sovereign. That the funds in question were the property of a foreign sovereign at the time the State court actions were instituted we think is clear. The property and personal rights of a sovereign can not be made subject to litigation in the courts of another nation, unless the sovereign agrees to be a party to such litigation. The Soviet Government did not agree to be a party to any litigation in the State of New York, involving its funds. It follows, therefore, that the State courts had no jurisdiction, even though the Soviet Government was an unrecognized government.

But if it be considered that the State courts could have had jurisdiction of a *res* belonging to an un-

consenting foreign government, because of non-recognition of that government, such jurisdiction was lost on the date of recognition, which was November 16, 1933. It follows, therefore, that at the time of the institution of the instant suits by the United States, the State courts had no jurisdiction over these assets.

We submit, therefore, that the District Court has jurisdiction to determine the claim of the United States to the funds in question.

ARGUMENT

I

THE SOVIET DECREES DISSOLVING THESE RUSSIAN INSURANCE CORPORATIONS, APPROPRIATING THEIR ASSETS, AND TERMINATING THE RIGHTS OF CREDITORS AND STOCKHOLDERS THEREIN, TRANSFERRED TO THE SOVIET GOVERNMENT THE NEW YORK ASSETS OF THESE CORPORATIONS, EXCEPT SUCH ASSETS AS WERE REQUIRED TO RESPOND TO THE CLAIMS OF CREDITORS WITHIN THE STATUTORY TRUST CREATED BY SECTION 27, NEW YORK INSURANCE LAW

In its bills of complaint, the United States has alleged that in 1918 the Russian state, by decrees, dissolved all Russian insurance corporations, including those herein concerned, and appropriated their assets, and the rights of their stockholders in these assets.[9] Since these bills were attacked by

[9] The basic decree herein concerned is the decree of December 1, 1918, set forth at pages 9–10 of the *Record* in *Bank*

motions to dismiss for failure to state a cause of action, the allegations therein must be considered true for purposes of this review.[10]

The United States does not contest the validity of the statutory trusts in the assets of these companies, created by Section 27 of the New York Insurance Law, for the benefit of persons doing busi-

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of New York & Trust Company. The pertinent portions of that decree read as follows:

> (1) Insurance in all its forms, * * * is hereby proclaimed as a State monopoly. * * *
>
> (2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree are subject to liquidation; * * *.
>
> (3) For the immediate organization of the insurance business and for the liquidation of insurance institutions which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual). * * *
>
> NOTE.—The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Federated Soviet Republic.
>
> (4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished not later than the first day of April, 1919.

Other decrees, relating to the monopolization of all insurance business and the dissolution of private insurance companies, are set forth in the *Record*, *Bank of New York & Trust Co.*, pp. 9, 26, 30, 32.

[10] See *Ansorge* v. *Kane*, 244 N. Y. 395; *Ebsary* v. *Raymond & Whitcomb Co.*, 300 Fed. 685 (W. D. N. Y.).

ness with the New York branches of these companies. It is, however, conceded by the respondents that all persons who asserted claims against these assets as beneficiaries under these trusts have been paid in full.

In the argument hereinbelow the contention that the New York assets of these companies passed to the Soviet Government through operation of Soviet decrees, must be understood not to cover that portion of the assets required to respond to claims of persons within the protection of this statute.

A. THE DISSOLUTION OF A CORPORATION AND THE TRANSFER OF ITS PROPERTY IS GOVERNED BY THE LAW OF THE STATE OF INCORPORATION

1. It is settled that a State which creates a corporation likewise has power to dissolve it. *Oklahoma Gas Co.* v. *Oklahoma*, 273 U. S. 257; *Ewen* v. *American Fidelity Co.*, 271 Fed. 848 (C. C. A. 2d).

It is also settled that foreign jurisdictions must accept the law of the State of incorporation as determinative of the existence of a corporation. *Pendleton* v. *Russell*, 144 U. S. 640.

2. The relationship between a corporation and its creditors and shareholders is governed by the law of the State of incorporation. *Canada Southern Ry.* v. *Gebhard*, 109 U. S. 527; *Royal Arcanum* v. *Green*, 237 U. S. 531; *Modern Woodmen* v. *Mixer*, 267 U. S. 544; *Broderick* v. *Rosner*, 294 U. S. 629.

In *Canada Southern Ry.* v. *Gebhard, supra,* suit was brought in New York by a New York resident to enforce an obligation of a Canadian railroad payable in New York. The debtor pleaded the discharge of the obligation through a "scheme of arrangement" confirmed by the Dominion Legislature, which substituted, for the obligation sued upon, a different obligation. The plaintiff had not assented to the arrangement. It was held that the arrangement was binding on the plaintiff, since the Dominion Government possessed the power to enact a statute changing the obligation of the company, in the absence of any applicable constitutional provision. The Court stated at 109 U. S. 537:

> A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty" (*Bank of Augusta* v. *Earle,* 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad* v. *Koontz,* 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel,* 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia,* 8 Wall. 168), but, if admitted, it must, in the absence of legislation

equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

In *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, it was held that the liability of a United States citizen on an assessment on shares of a British corporation was governed by a British statute. The Court stated, p. 230:

> By subscribing to stock in a foreign corporation, defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation.

We submit that the application of this doctrine to the facts in these cases forces the conclusion that the title to the assets of these corporations acquired by the Soviet Government through its decrees must be recognized in the courts of the United States.

3. The Soviet decree of December 1, 1918 (R. 9) provides that a commission shall be established to liquidate the insurance corporations whose assets by that decree were appropriated by the Soviet Government.

Our courts are familiar with statutes which provide that upon the dissolution of an insurance corporation an individual designated by such statute takes title to the assets of the property and becomes entitled to bring suit in his own name for the assets, wherever located, of such dissolved corporation. *Clark* v. *Williard*, 292 U. S. 112; *Relfe* v. *Rundle*, 103 U. S. 222; *Martyne* v. *American Fire Insurance*

Co., 216 N. Y. 183; *Cogliano* v. *Ferguson*, 245 Mass. 264; *Bockover* v. *Life Association of America*, 77 Va. 85; *Restatement of the law of Conflict of Laws*, Section 161.[11]

We submit, therefore, that the Soviet Government, through its Liquidation Commission, acquired title to the assets of these corporations wherever located, and that this title must be recognized by the courts of New York.

B. RECOGNITION OPERATES RETROACTIVELY AND ADMITS THE VALIDITY OF THE DECREES OF THE SOVIET GOVERNMENT FROM THE DATE OF THE INCEPTION OF THAT GOVERNMENT

It belongs exclusively to the executive branch of this Government to recognize or to decline to recognize an existing government. *Rose* v. *Himely*, 4 Cranch, 241, 272; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Kennett* v. *Chambers*, 14 How. 38. Such determination when made by the political department of the Government concludes the courts in respect of the legal status of such foreign sovereign or government. *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *Jones* v. *United States*, 137 U. S. 202, 212.

[11] Section 161 provides: "If a statute of the state of incorporation which is in force at the time of the dissolution of a corporation provides that all its assets shall, upon dissolution, pass to a person designated in the statute, the right of such person to the personal property, wherever situated and whether tangible or intangible, will be recognized and given effect by other states, and the designated person can bring suit in any State upon claims due to the corporation."

In *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 303, this Court stated that

> recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.

And in *Underhill* v. *Hernandez*, 168 U. S. 250, at 252, this Court stated that

> If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation.

This Court will, of course, take judicial notice of the recognition of the Soviet Government by our Government, on November 16, 1933. *Jones* v. *United States, supra; Underhill* v. *Hernandez, supra; Oetjen* v. *Central Leather Company, supra.* It follows that recognition having been accorded, the Soviet Government must be accepted as the legitimate governmental authority in Russia, and its institutions and laws as an adequate expression of the national will.

In *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 83, the Court of Appeals of New York has aptly summarized the situation in the following language:

> In Russia, where all these insured were, with one or two exceptions, these decrees were laws to be obeyed. They were the laws

> of their government. As to them the Soviet Republic was no body of bandits, confiscating property, but an existing government, carrying out new theories of insurance. If the Russian people, under their Soviet form of government, determined to abolish all private insurance for their citizens and establish a system of social protection by the State, that was their affair, not ours, and however objectionable we may consider the monopolization of all business, including insurance and banking, and the conduct of it thereafter by the government, we at least must admit that other peoples can try the experiment if they desire.
>
> * * * Of course we start with the premise that the United States has now recognized the Soviet Republic, and that the government of Russia is in all respects to be treated as any other power in Europe. At the time the referee heard and decided this case the Soviet Republic had not been recognized by the United States. His conclusions of law and findings of fact were governed by our decisions existing at that time. We, however, must now give full force and effect to the action of our government (*Ricaud* v. *American Metal Co., Ltd.*, 246 U. S. 304; * * *.

The same conclusion was reached by the Court of Appeal of England in *Luther* v. *Sagor* (1921), 3 K. B. 532. That case involved the title to property seized by the Soviet Government within the territory of Russia. When the case was before the lower court, Great Britain had not accorded even

de facto recognition to the Soviet Government. Consequently, the title derived from the seizure by that government was not recognized. However, prior to appeal, Great Britain accorded *de facto* recognition to the Soviet Government. This fact alone was held to require a reversal of the lower court and a recognition of the validity of the title derived from the Soviet Government. The court stated at p. 546:

> * * * Even if it was open to the Courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the Courts could treat this particular decree otherwise than as the expression by the de facto government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws. * * *

It should be noted that the most recent authoritative decision of the courts of Great Britain likewise supports the contention of the United States in the instant suits. This is the decision of the House of Lords in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (1933) A. C. 289. The case involved the validity of a garnishee order absolute obtained by plaintiffs as judgment creditors of a dissolved Russian banking corporation against the Midland

Bank as the debtor of that corporation. The garnishee order was based on a default judgment obtained by plaintiffs against the dissolved Russian corporation on service by mail on the Russian corporation in Russia pursuant to court order. The House of Lords affirmed the judgment of the Court of Appeal reversing the garnishee order on the ground that the order had been obtained by service on a nonexistent defendant. Conflicting evidence as to the continued existence of the Russian corporation subsequent to Soviet decrees purporting to effect its dissolution was reviewed by the court. The gravamen of the decision appears in the following extract from the opinion of Lord Wright: (1933) A. C. at 279:

> English courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. * * * But as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact.

Lord Wright in his opinion distinguishes and in effect overrules certain earlier decisions of the House of Lords in which the continued existence in Great Britain of dissolved Russian corporations

appears to have been found, on the ground that the evidence on which those decisions were based was not so complete as the evidence before the House of Lords in the *Lazard* case.[12]

Since recognition of the Soviet Government by the United States Government validates retroactively all acts of that government since its accession to power (*Oetjen* v. *Central Leather Co., supra; Ricaud* v. *American Metal Co., supra*), our courts must recognize as legally effective the dissolution of these Russian corporations by the law of the creating country. *Dougherty* v. *Equitable Life, supra; Lazard Bros. & Co.* v. *Midland Bank, supra;* see *Issaia* v. *Russo Asiatic Bank,* 266 N. Y. 37, 43.

It therefore remains only to determine whether the application of those decrees to the New York assets of these corporations which is required by rules of conflict of laws or of comity, can be avoided on any theory of public policy.[13]

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[12] Among the cases distinguished are *Employers' Liability Assurance Corporation, Ltd.* v. *Sedgwick, Collins and Company, Ltd.* (1927) A. C. 95; *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1925) A. C. 112, and *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (1925) A. C. 150, which were relied upon by respondents in their briefs below. See also, in accord with the *Lazard* case, *In re Russian Bank for Foreign Trade* (1933) 1 Ch. Div. 745.

[13] The respondent in the *Manhattan Company* case has asserted (*Manhattan Company Record*, pp. 39–42) certain administrative "circulars" of the Soviet Government, which that respondent claims restrict the application of the decree

C. RUSSIAN DECREES DISSOLVING RUSSIAN INSURANCE CORPORATIONS AND TRANSFERRING THEIR INTANGIBLE PERSONAL PROPERTY TO THE RUSSIAN STATE, ARE NOT OPPOSED TO THE PUBLIC POLICY OF THE UNITED STATES

It is to be noted in the instant cases that the claims of all domestic creditors and policyholders protected by Section 27 of the New York Insurance Law have been satisfied. That being accomplished, we submit that there is no room for the application of the doctrine of public policy.

The District Court held that the application of these decrees would have the effect of giving extra-territorial force to Soviet decrees of confiscation, and that this would be contrary to the public policy of the United States. The court below failed to adopt the opinion of the District Judge and the grounds on which he dismissed the bills of complaint, and moreover failed to state that there was anything opposed to our public policy in giving effect to the decrees which operated upon Russian corporations and their stockholders.

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of December 1, 1918. That issue, which may arise at the trial, is not pertinent herein, because the respondents, by their motions to dismiss, are deemed to have admitted all material allegations in the bills of complaint. In any event, these "circulars" were considered at length and passed upon in *Perry* v. *Equitable Life Assurance Society*, 45 T. L. R. 468 (K. B. 1929), wherein it was held that they did not constitute binding declarations of Russian law, and therefore did not restrict the application of the decree of December 1, 1918.

The respondents, both in the court below and in their briefs in opposition to the petition for writs of certiorari in the instant cases, vigorously contended that the United States is seeking to give extra-territorial effect to confiscatory Russian decrees in defiance of the public policy of the United States. We think an examination of the position of the Government in this respect will fail to support the contention of the respondents.

1. The question, as we view it, is primarily one of conflict of laws, and in the final analysis depends upon the rule of conflicts which the courts of this nation have adopted, as applied to surplus assets of a dissolved foreign corporation.

In *Restatement of the law of Conflict of Laws,* Section 1, it is stated that

> no state can make a law which by its own force is operative in another state; the only law in force in a sovereign state is its own law, but by the law of each state rights and other interests in that state may in certain cases depend upon the law in force in some other state or states.

This principle finds application in determining the transfer of title to intangibles. In contending that the United States has acquired title to these particular funds by virtue of Soviet decrees, the United States is not necessarily seeking to give extra-territorial effect to these decrees, but is, on the other hand, contending that as between a Russian corporation and the Russian Government the title to in-

tangibles formerly owned by a Russian corporation, wherever situated, will depend upon the laws of Russia.

Certainly the public policy of this country is not concerned with the manner in which the Russian Government deals with its own corporations and their property. These are matters into which no other state has a right or reason to inquire. *Dougherty* v. *Equitable Life Assurance Society, supra.*

We think it clear that where the conflicts law in respect of title is settled, our courts are not concerned with the fact that the foreign title was acquired by confiscation. In *Oetjen* v. *Central Leather Company, supra,* and *Ricaud* v. *American Metal Co., supra,* the question before this Court involved the title to tangible personal property admittedly confiscated by the Government of Mexico. In deciding those cases, this Court looked to the conflicts law which was stated to be that title to tangible personal property passed in accordance with the laws of the situs of such property, and that being so, the manner in which the title passed was immaterial. In the *Oetjen* case (246 U. S. 297, 303), this Court stated:

> To these principles we must add that: "Every sovereign State is bound to respect the independence of every other sovereign State, and *the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.* Redress of grievances by reason of such acts must be obtained through the

means open to be availed of by sovereign powers as between themselves." *Underhill* v. *Hernandez,* 168 U. S. 250, 253; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347.

Applying these principles of law to the case at bar, we have a duly commissioned military commander of what must be accepted as the legitimate government of Mexico, in the progress of a revolution, and when conducting active independent operations, seizing and selling in Mexico, as a military contribution, the property in controversy, at the time owned and in the possession of a citizen of Mexico, the assignor of the plaintiff in error. Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to reexamination and modification by the courts of this country.

The principle that *the conduct of one independent government cannot be successfully questioned in the courts of another* is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest consideration of international comity and expediency. *To permit the validity of the acts of one sovereign State to be re-*

> *examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."* (Italics ours.)

We submit, therefore, that the fact that title passes by virtue of confiscatory decrees is a matter of no concern when our courts have adopted a rule of conflicts within which such legislation clearly falls.

2. Considerations of local public policy may not be invoked to subject to the jurisdiction of a local court the property of a foreign sovereign.

This Court has held that a substantive *defense* may not be disregarded on the ground of local policy. In *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, the Court said (p. 160):

> * * * But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. Compare *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 407, 408. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under

> the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.

If the courts of New York, because they are not sympathetic with the manner in which the Soviet Government acquired title to these assets, are at liberty to place them beyond the reach of the United States by distributing them to creditors and stockholders whose claims are not based on New York transactions, the result will be to subject the United States, the assignee of the Soviet Government, to irremediable loss. These assets are entitled to the protection of immunity from suit (enjoyed by both the United States Government and the Soviet Government) and, on grounds of international comity, should not be made subject to the varying notions of public policy which may be entertained by local tribunals.

The contention of the respondents that the claim which the United States is asserting may not be allowed because to do so would violate the public policy of the United States is incongruous. This sets up as a defense that the sovereign may not succeed because its action is opposed to its own public policy. It is not denied that the United States is asserting a claim which it has acquired by the exercise of its sovereign power over its own foreign relations. Whatever may be said of the public policy of the United States, when there is involved a dispute between private parties, we think it clear

that no question of public policy can arise when the sovereign asserts the claim.

The executive branch of the Government, by the Chief Executive, has, in effect, determined the public policy of the United States with regard to the acts and decrees of the Soviet Government; and that declaration of policy has been tacitly approved by the legislative branch of the Government.[14] If local courts may, as each sees fit, override the declared national policy by refusing, in effect, to carry out that policy, the consequences might be indeed serious. As was said by Chief Justice Taney in *Doe v. Braden,* 16 How. 635, 656:

> * * * it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

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[14] See Congressional Record, Vol. 78 (Jan. 11, 1934), pp. 460, 461, where, in the debate in the State, it is said that valid agreements have been "reached between the President and the representative of the Russian Soviet Union upon which the recognition of the Soviet Government is based," founded upon the exclusively "Executive function and prerogative to recognize foreign governments," and there was mentioned "the basis of contractual relationship upon which recognition has been granted * * *."

That language is equally apt in the present situation. It would be impossible for the Executive to conduct our foreign relations if every local court was authorized to superimpose its views as to morals and public policy with respect to the title of a foreign sovereign to property which by a formal agreement it has assigned to the Government of the United States.

Likewise, this Court stated in *Terlinden* v. *Ames*, 184 U. S. 270, at p. 290:

> The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision, and it results that where the proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of habeas corpus.

The acquisition of property by assignment from a foreign power is, like extradition, a matter peculiarly within the sphere of the executive department.

As was said by Lord Scrutton, L. J., in *Luther* v. *Sagor* (1921), 3 K. B. 532, 558–559:

> * * * But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is "contrary to essential principles of justice and morality." Such an allegation might well with a susceptible foreign government become a *casus*

> *belli;* and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized.

Again, at p. 559:

> * * * I do not feel able to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or nonrecognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges.

One of the respondents suggests that the public policy to be considered is that of the State of New York and not that of the United States. This statement, we believe, in the light of the fact that there is here involved negotiations between sovereigns, carries with it its own refutation. The United States, in the conduct of its foreign relations, cannot be made subject to forty-eight different views of public policy. In that respect, its own public policy is and must be supreme.

D. THE PROPERTY HERE INVOLVED WAS LEGALLY SITUATED IN RUSSIA AND ITS TRANSFER WAS THEREFORE BY RUSSIAN LAW

If, and in so far as, there is involved herein any question of giving extraterritorial effect to the decrees of the Soviet Government, it is predicated upon the assumption that the New York courts and

the courts hereinbelow were necessarily dealing with property legally situated within the State of New York. We submit that in determining the issues herein, the property here in question must be deemed situated in Russia.

The deposits of the insurance companies in the State of New York consisted primarily of bonds evidencing municipal, State, or Federal obligations. As such they were, of course, intangibles. Applying the doctrine of *mobilia sequuntur personam,* it follows that these intangibles had their situs at the domicile of the former owners, the Russian insurance corporations, and that, therefore, they were legally under the control of Russia at the time the corporations were terminated, and were subject to transfer to the successor of the dissolved corporations in accordance with the law of Russia. *Blodgett* v. *Silberman,* 277 U. S. 1.

Intangibles are held to include municipal obligations (*Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204), stock certificates, United States bonds and Treasury certificates of indebtedness, savings bank accounts, and life insurance policies. *Blodgett* v. *Silberman,* 277 U. S. 1, *supra.* The Court, in that case, stated (p. 9):

> At common law the maxim "*mobilia sequuntur personam*" applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to in-

> tangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the State of the domicil or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

Likewise, this Court, in *Helvering* v. *Stockholms, etc. Bank,* 293 U. S. 84, 92, said:

> Thus, intangible personal property has been held to have a situs at the domicile of the owner, although intangibles ordinarily have no actual situs and the paper evidence of their existence may be elsewhere. *First National Bank* v. *Maine,* 284 U. S. 312, 328–329.

While these assets might be deemed to have formerly had a situs in New York by virtue of Section 27 of the New York Insurance Law, that section lost its applicability to them when the claims under this statute were paid. Thereafter, the surplus of these funds must be deemed, according to the usual rule, to have its situs at the domicile of the corporation.

E. THE RIGHTS HEREIN ASSERTED ON BEHALF OF ADVERSE CLAIMANTS HAD A SITUS AT THE DOMICILE OF THE DEBTOR, AND WERE THEREFORE GOVERNED BY RUSSIAN LAW

Respondents contend that the courts of New York must be left undisturbed in their adjudica-

tion of the rights in these funds of creditors and stockholders not within the protection of Section 27 of the New York Insurance Law, and that those claims must be permitted to proceed to judgment. We submit, however, that those claims had their situs at the domicile of the debtor, the Russian insurance corporation, and are not maintainable in New York after the dissolution of the corporation in its domiciliary State. *Ewen* v. *American Fidelity Co., supra.* These claims arose either out of transactions in no way connected with the New York business of these corporations, or out of a status as shareholder in these corporations created by Russian law.[15] Clearly such claims are governed by Russian law, and when Russian law declared that the assets of these corporations, through their absorption into the assets of the Russian state, might not respond to such claims, the claims became unenforceable everywhere. In *Deutsche Bank* v. *Humphrey,* 272 U. S. 517, this Court, in declining to give greater effect in this country to an obligation created by German law than was required by the law which created it, stated at page 519:

> A suit in this country is based upon an obligation existing under the foreign law at

[15] Some of the claims arose out of contracts which were purported to have been made on behalf of the Russian corporations after their dissolution. Clearly, however, after this dissolution no persons possessed authority to make contracts which could form the basis of a claim against assets which had previously passed to the Soviet Government.

> the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here.

A situation somewhat similar to the one here involved was before this Court in *Zimmerman* v. *Sutherland,* 274 U. S. 253. In that case an alleged creditor of an Austrian bank sought to reach in satisfaction of the debt property of the debtor in the hands of the Alien Property Custodian. The debt was created by Austrian law and had been discharged by Austrian law. In denying relief to the creditor, this Court stated at p. 255:

> The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else which seemed to them about fair.

As was stated by the New York Court of Appeals, in *Russian Reinsurance Co.* v. *Stoddard,* 240 N. Y. 149, 167, in passing upon the right of the Russian Reinsurance Company to recover its surplus assets in New York:

> We have pointed out that the existence of the corporate plaintiff, its right to sue, the authority of the directors and the devolution of title to its assets must all be determined by Russian law.

In *Dougherty* v. *Equitable Life Assurance Society,* 266 N. Y. 71, 87, the same court, in declaring that insurance policies performable in Russia which had been cancelled by Russian law could not be sued upon in New York, stated:

> The plaintiffs seek to make a distinction between the seizure of tangible property (*Salimoff* and *Sagor* cases) and the disposition and canceling of rights to intangible property. We can see no distinction in this instance. The right to collect money by a Russian citizen on a contract to be interpreted according to Russian law is no different in this respect than the right to tangible property in Russia or the possession thereof. Both rights are dependent upon the law of Russia.

Therefore, since the adverse claimants had no enforceable right in Russia when the State suits were instituted, no right existed here or elsewhere.

But whether these funds and the claims against them be deemed to have a situs in New York or a situs in Russia, it is clear that the basic act underlying this litigation is the destruction of the legal identity of these corporations. This was an act within the legal competence of the Government of Russia and performed in Russia. Therefore, our courts, according to the doctrine of the *Oetjen* and *Ricaud* cases, must accept and give effect to the consequences flowing from that act.

F. THE CASES UPON WHICH THE RESPONDENTS HAVE HERETOFORE RELIED, AS AUTHORITY FOR THE PROPOSITION THAT THE SOVIET DECREES OF CONFISCATION ARE NOT EFFECTIVE TO TRANSFER TITLE TO INTANGIBLES LOCATED IN NEW YORK, ARE NOT APPLICABLE

All the cases cited by the respondents for the purpose of supporting their contention that no extraterritorial effect will be given to Soviet decrees of confiscation, because such decrees are contrary to the public policy of the forum, lack an essential element which is present in this case. Here, the sovereign itself is bringing the action. We perceive nothing in any of the cases cited which could be taken as authority for the proposition that the courts can declare the enforcement of such decrees to be contrary to the public policy of a sovereign where the sovereign itself is seeking to assert a claim founded upon such decrees.

The following decisions of this Court have been relied upon by respondents herein:

Russian Volunteer Fleet v. *United States,* 282 U. S. 481. That case was not, as implied in the briefs of appellees in the lower court, a holding to the effect that Soviet decrees dissolving Russian corporations are contrary to the public policy of the United States. The issue on that appeal was the jurisdiction of the Court of Claims to entertain an action by the Russian Volunteer Fleet against the United States to recover compensation for the requisitioning by the United States, under the Emergency Shipping Act of June 15, 1917, of cer-

tain contracts for the building of vessels. It was urged that since American citizens might not sue for similar compensation in the courts of the Soviet Union on account of non-recognition of the Soviet Union by the United States, Section 155 of the Judicial Code prevented an action by the Russian Volunteer Fleet in the Court of Claims. It was held that the authority to sue in the Court of Claims for such compensation conferred by the Emergency Shipping Act of June 15, 1917, being express authority, rendered Section 155 of the Judicial Code inapplicable to this particular action, and hence that an action might be brought by the Russian Volunteer Fleet in the Court of Claims. The language of the opinion was carefully confined to the prescise issue before the Court.

Second Russian Insurance Co. v. *Miller,* 268 U. S. 552. In this case it was held that a contract between a Russian national and a German national to be performed in Germany and in New York, which contract was valid according to both German law and New York law, could not be abrogated by a Russian ukase which purported to abrogate all contracts between Russian nationals and enemy aliens. The Court recognized, however, that this ukase did not purport to regulate the relations between a corporation and its creditors and stockholders. On the other hand, the Court cited with approval *Canada Southern Ry. Co.* v. *Gebhardt,* 109 U. S. 527, relied upon above, in the following language at 268 U. S. 560:

> * * * Nor does *Canada Southern Ry. Co.* v. *Gebhardt,* 109 U. S. 527, relied upon by appellant, support the contention. That case only laid down the doctrine recently affirmed by this Court (*Modern Woodmen of America* v. *Mixer,* 267 U. S. 544) that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property.

Certainly, *Second Russian Insurance Co.* v. *Miller, supra,* does not stand for the proposition that Soviet decrees affecting the dissolution of a Russian corporation will not be recognized in the courts of the United States.

Baglin v. *Cusenier Co.,* 221 U. S. 580, involved the right of a French statutory liquidator of the property of the Order of Carthusian Monks to sell in the United States under the trade name "Chartreuse", liqueur manufactured by him in France in competition with liqueur similarly named manufactured by these monks in Spain after their expulsion from France. Prior to their expulsion the monks had registered the name "Chartreuse" in the United States (see *Bauer* v. *Order of Carthusian Monks,* 120 Fed. 78). For this reason and also because it had been held that by French law the trade marks abroad had not passed to the statutory

liquidator, it was held that the monks were entitled to the continued use of the trade name "Chartreuse" in the United States. This decision has no bearing on the effect of Soviet decrees which have had for their object the nationalization of Russian corporations and the absorption into the assets of the Soviet state of all property of such corporations wherever situated.

A number of cases of the Court of Appeals of New York have been cited as sustaining the position of the respondents. Among these are *Sokoloff* v. *National City Bank,* 239 N. Y. 158; *Joint Stock Co.* v. *National City Bank,* 240 N. Y. 368; *Petrogradsky M. K. Bank* v. *National City Bank,* 253 N. Y. 23, certiorari denied, 282 U. S. 878; *Vladikavkazsky Railway Co.* v. *New York Trust Co.,* 263 N. Y. 369. With the exception of the *Vladikavkazsky Railway* case, all of these cases were decided before recognition of the Soviet Government, and the language in them, to the general effect that Soviet decrees will not be recognized in courts of New York, must be considered in that light.

The *Vladikavkazsky Railway* case involved a deposit in a New York bank made by a Russian railway corporation for the purpose of paying interest on bonds issued by that corporation in the United States. The bank denied liability on the ground that the plaintiff had lost its corporate identity by Russian law. This defense, if successful, would have brought about the result that

the bank would retain a deposit to which, as between the parties to that suit, it clearly was not entitled. It is submitted that the rationale of this decision, as well as of the previous decisions of the New York Court of Appeals, in which it was held that Russian corporations might maintain actions in New York despite their dissolution in Russia, is to be found in the following language at page 378:

> In the case at bar, as in the other Russian cases which came to this court before the recognition of the present Russian government, the practical question was and is, shall the law compel a debtor in this State to pay its debt or permit it to hold the property of its creditor indefinitely? This court definitely answered the question by deciding that although the corporation in question was extinguished in its homeland and there dead in the eyes of the law, it continued its existence as "a juristic person with capacity to sue" in this State (*Petrogradsky M. K. Bank* v. *National City Bank, supra*). The deposit was made in New York city, the home of the bank; that is where the contract obligation was created and where it is by its terms to be performed, entirely outside Russian jurisdiction.

We submit further that, even apart from the factor of recognition, these decisions of the New York Court of Appeals are not authority for the present contention of the respondents that Soviet

decrees cannot be given effect by New York courts on grounds of public policy, for two reasons:

First, each of them involved a contract made in New York and performable in New York, obligations over which the New York courts had jurisdiction. To these contracts the New York courts might apply New York law, irrespective of the nationality of the creditor or of the creditor's status according to the law of its domicile.

Second, each of them involved a controversy between a private claimant of Russian nationality and a New York bank. No statutory successor of the Russian claimant asserted a claim to the deposit. There is no intimation in the court's language in any of the cases as to what would have been the result if the Soviet Government as statutory successor, had claimed the deposit adversely to the private claimant.

In none of these cases was it stated that the New York courts had jurisdiction of the controversy merely because the assets involved happened to be situated in New York. In the decision below, however, the claim of the United States, as the assignee of the statutory successor of a Russian corporation, has been denied on the sole ground that these assets are in the custody of the New York State court for a special purpose, namely, for distribution to persons asserting claims, although not within the protection of Section 27 of the New York Insurance Law. We submit that previous New York decisions

have not, as asserted by respondents, laid down a rule that creditors and stockholders of Russian corporations, i. e., those not within the protection of the above statute, may reach New York assets of these corporations despite the extinguishment of these claims by Russian law. On the contrary, in *Dougherty* v. *Equitable Life Assurance Society, supra,* the latest decision of the New York Court of Appeals on this question, the court declined jurisdiction of a controversy arising out of contracts made in Russia and performable in Russia and governed by Russian law, even though it had jurisdiction of the parties and over assets of the debtor, a New York corporation, and even though such assets were pledged for the exact fulfillment of the contractual obligations.

The decisions of the New York Court of Appeals [16] in 1931, on which respondents rely to establish the jurisdiction of the New York courts to retain possession of these assets against the adverse claim of the United States as assignee of the statutory successor of these corporations, do not lay down a general rule. They were addressed to a particular situation. The Soviet Government was then unrecognized and had been denied access to the courts of New York. *R. S. F. S. R. Co.* v.

[16] *Matter of People* (*Russian Reinsurance Co.*), *supra; Matter of People* (*Northern Insurance Co. of Moscow*), *supra;* see also *Matter of People* (*Northern Insurance Co. of Moscow*), 262 N. Y. 453.

Cibrario, 235 N. Y. 255; *The Penza*, 277 Fed. 91 (E. D. N. Y.). The New York court was confronted with the problem of whether it should affirm the disposition of these assets approved by the Appellate Division, namely, that they should be held until a government in Russia should be recognized by the United States,[17] or whether it should permit persons not within the protection of Section 27 of the New York Insurance Law to reach these assets. It chose the latter alternative, not necessarily because it desired to afford protection to the claims of such persons[18] (the validity of the claims was to be determined by further litigation), but because it was unwilling to permit an indefinite postponement of a problem which had caused the New York courts vexation for many years. Since these decisions, however, the Soviet Government has been recognized, its legal status as successor to the rights of the corporations is recognized, and its claim to these funds has been asserted through its assignee. That fact completely changes the situation with respect to these funds, as compared to the situation which was presented to the New York Court of Appeals in 1931, and

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[17] *Matter of People* (*Northern Insurance Co.*), 299 App. Div. 637.

[18] It had been held in several previous cases that the claims of such persons were not cognizable by New York courts. *Martyne* v. *American Fire Insurance Co.*, *supra*; *Matter of People* (*City Equitable Life Ins. Co.*), *supra*; *Matter of People* (*Norske Lloyd Ins. Co.*), *supra*.

consequently makes the particular decisions of that court no longer applicable as a reason for upholding the continued jurisdiction of the New York courts over these assets.

In respect of other cases cited from foreign jurisdictions, we think that, on close analysis, it will be found that much of the language in those cases was unnecessary to the decision of the actual question before the courts, and that it does not apply to the specific problem herein. The foreign cases referred to concerned the protection of rights acquired locally, such as the payment of debts, the enforcement of contracts, and the right of succession under the local laws, all of which come properly under the operation of well-established rules of conflict of laws.

We submit, therefore, that there is nothing in the decisions upon which the respondents have relied which in any manner is decisive of the question here presented.

In concluding the first point of this brief, we again call attention to the fact that we are herein concerned only with the surplus funds remaining after the claims of our own domestic creditors and policyholders have been satisfied, pursuant to Section 27 of the New York Insurance Law, which required a special deposit of these funds in order to protect persons who transacted business with these companies in the United States. Ownership of

these surplus funds is herein asserted by the United States, as assignee of the Soviet Government. The Soviet Government is a duly recognized foreign sovereign, and as such its decrees and acts, relating to property and rights over which it has jurisdiction, are given full force and effect by our Government and by our courts. Consequently, our courts must take cognizance of the title acquired by the Soviet Government, in and to the funds here in question, by virtue of the decrees of that government whereby these Russian corporations were dissolved and all their assets were taken over by that government. As this Court and other courts have repeatedly stated, we are in no way concerned with the wisdom or justice of that appropriation by the Soviet Government; that is purely a matter as between the Soviet Government and its own nationals. The question, therefore, becomes primarily one of conflict of laws. It is a well-settled principle of American law that title to intangibles is governed by the law of the domicile of the owner. In light of that principle, we look to the law of the domicile of these Russian corporations, which admittedly was Russia, and there we find that by Russian law title to the funds here in question was duly acquired by the Soviet Government.

In the succeeding point of this brief we show that the title of the Soviet Government was duly assigned to the United States.

II

THE FUNDS HELD BY THE RESPONDENTS WERE TRANSFERRED TO THE UNITED STATES BY THE LITVINOFF ASSIGNMENT

The assignment is contained in an exchange of letters between President Roosevelt and Maxim Litvinoff, People's Commissar for Foreign Affairs, of the Soviet Government. The trial court ruled that the assignment did not cover the claims herein asserted by the United States. The Circuit Court of Appeals held that for the purpose of the instant cases, the assignment was sufficient to transmit to the United States whatever rights the Russian Government had to these deposits. The respondents, however, assert that the funds involved in the cases at bar fall outside the scope of the assignment.

A. THE LANGUAGE OF THE ASSIGNMENT COVERS THESE CLAIMS

The assignment states [19] that the Soviet Government, preparatory to a final settlement of claims between the two governments and the claims of their nationals, agrees that it will not take any steps in any pending litigation or institute any new litigation to obtain the amounts admitted to be due or that may be found to be due the Soviet

[19] The text of the assignment is set forth in the Appendix to this brief, p. 90.

Government as the successor of prior governments of Russia, "*or otherwise*", from American nationals, and assigns all such amounts to the United States. The assignment then states that the Soviet Government further agrees, preparatory to the final settlement mentioned, not to make any claims with respect to judgments by American courts or acts done or settlements made by or with the United States or its nationals relating to any property of any government of Russia or the nationals thereof.

It is clear from the language of the assignment, which is broad and inclusive, that it was intended to transfer any claim or amount due to the Soviet Government from American nationals. The funds held by the respondents are amounts due from the respondents, American nationals, to the Soviet Government.

We think the purpose and scope of the assignment were aptly summarized by Judge Manton, who in his dissenting opinion in the court below stated (R. 95):

> The ultimate design of the two countries in executing this assignment was to transfer "the claims and counterclaims between the governments of the Union of Soviet Socialist Republics and the United States of America, and the claims of their nationals," to the broad plane of diplomacy, and by placing those claims beyond the reach of vexatious judicial action, to facilitate at one stroke, the adjustment of the delicate points

at issue between the two countries. No narrow or strained construction of that instrument is permissible under these circumstances.

The agreement of the Soviet Government, a friendly power with free access to the courts of the United States, not to sue in our courts to recover the amounts due it, requires the interpretation that *all* claims were assigned to the assignee. Any other interpretation would imply the abandonment of claims not assigned, and certainly that was not intended. The deliberately broad language of the assignment should be given effect. There is no reason to except from the operation of the assignment any particular claims of the Soviet Government.

The District Court stated that the funds were not due the Soviet Government from American nationals, but that the funds belonged to the dissolved insurance corporations, that the respondents were merely custodians of the funds, and that the assignment refers only to such claims wherein an American national is directly the debtor of the Russian Government. We contend that the District Court's interpretation is incorrect. The assignment applies equally to claims of the Soviet Government, as successor of its dissolved corporations, which arise out of relations between the dissolved corporations and American nationals.

Specific reference in the assignment to the claim of the Russian Volunteer Fleet against the United

States does not indicate, as the District Court suggested, that if such funds as those held by the respondents were to be assigned, a specific reference to such funds would have been required. The claim of the Russian Volunteer Fleet was included in terms for several reasons: First, because the claim was against the United States directly, and was not covered by the general language of the assignment of claims against American nationals; second, because in the litigation in the Court of Claims it was denied that the Russian Volunteer Fleet was a government instrumentality; hence it was necessary to specify that the Soviet Government claimed through its instrumentality, the Russian Volunteer Fleet.

No more specific reference to the particular claims in dispute should be required than should be required for any other claims of the Soviet Government against American nationals. The character of the respondents as custodians of the funds does not remove them from the position of American nationals against whom claims exist within the language of the assignment.

B. THE INTERPRETATION ADOPTED BY THE SOVEREIGN PARTIES TO THE ASSIGNMENT SHOULD BE ACCEPTED BY THE COURT

The interpretation of the assignment to include claims to these funds of the Soviet Government, as made by the governments of Russia and the United States, is conclusive of the intention of the

parties to the assignment. The institution of these suits by the assignee, a fact well known to the assignor is ample indication of the intent of the parties to the assignment. Consequently, the construction adopted by the parties should be accepted, even if the language of the assignment were ambiguous, which we contend is not the fact.

In *State of Russia* v. *National City Bank of New York,* 69 F. (2d) 44, 48 (C. C. A. 2d), the court considered the scope of the Litvinoff assignment and stated that *"it is apparent that the intent was to assign all the claims of the Soviet government to the United States."*

The assignment, although not a treaty in the formal sense, is, as to the United States, an executive agreement with a foreign sovereign, and constitutes one of the conditions upon which recognition of the Soviet Government was granted. *State of Russia* v. *National City Bank, supra.* The rules applicable to the interpretation of treaties should be applied to the interpretation of such an executive agreement, not couched in the technical language of a formal assignment, but contained in the diplomatic correspondence of recognition.

Liberal construction of treaties is to be preferred. The construction adopted by the political department of the Government should be accepted.[20]

[20] If this Court is not convinced that the assignment includes this claim, by the language of the assignment and the interpretation given by the parties, and by the institution of these suits, it may ascertain the fact, which is a matter of

Factor v. *Laubenheimer*, 290 U. S. 276, 293–295; *Neilsen* v. *Johnson*, 279 U. S. 47, 52; *Tucker* v. *Alexandroff*, 183 U. S. 427, 437; *In re Ross*, 140 U. S. 453, 475; *Geofroy* v. *Riggs*, 133 U. S. 258, 270.

There can be no doubt of the power of Mr. Litvinoff to deal with property of the Soviet Union, whether its *situs* be found to be in the Soviet Union or in the United States. The assignment made by Mr. Litvinoff was a valid assignment, which he was entirely competent to effect. International law attributes to a Minister for Foreign Affairs certain functions, and the validity of his exercise of these functions cannot be questioned abroad. This view has recently been taken by the Permanent Court of International Justice in its judgment of April 5, 1935, with reference to the "Legal Status of Eastern Greenland." Publications of the Permanent Court of International Justice, Series A/B, No. 53. In that case, a declaration was made by Mr. Ihlen, Norwegian Minister of Foreign Affairs, with reference to the policy of the Norwegian Government. On page 71 of the report, the following statement is made:

> The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his

executive agreement between the governments of the United States and Russia, by addressing an inquiry to the State Department. *Underhill* v. *Hernandez*, 168 U. S. 250, 253; *Jones* v. *United States*, 137 U. S. 202, 216; *In re Baiz*, 135 U. S. 403; *Ex parte Hitz*, 111 U. S. 766; *Universal Adjustment Corp.* v. *Midland Bank*, 281 Mass. 303, 184 N. E. 152.

Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

III

The Federal Court Has Jurisdiction of the Instant Actions

The court below, in affirming the order dismissing the bills of complaint of the United States for insufficiency, has held that the District Court did not have jurisdiction to entertain the instant suits, on the ground that the New York State courts had acquired jurisdiction *in rem* of the funds in question, and that the suits by the United States in the Federal court were suits *in rem,* and that hence the Federal court must yield to the State court which had previously acquired jurisdiction. We submit that the ruling of the court below is erroneous. The doctrine of priority of jurisdiction is applicable only where one court has assumed jurisdiction of a *res* and another court thereafter attempts to deal with the *res* in a manner which would oust the prior jurisdiction of the other court. We submit that the doctrine is not applicable herein, for the following reasons:

(a) The Federal court has jurisdiction of these suits, by virtue of Section 24 (1) of the Judicial Code, which confers original jurisdiction upon the

District Courts of the United States to entertain suits brought by the United States.

(b) Irrespective of the original jurisdiction of the suits conferred upon the District Court, the doctrine of priority of jurisdiction is not applicable herein because these suits by the United States are essentially *in personam*, and in such a situation it is well settled that there is no conflict of jurisdiction with prior suits *in rem*. Furthermore, we submit that neither were the proceedings in the New York State courts necessarily *in rem*. If either of these contentions be correct the doctrine of priority is not applicable.

(c) The ruling of the Circuit Court of Appeals is based upon the assumption that the New York State courts had jurisdiction of the surplus funds in question at the time the United States suits were commenced in the Federal court. This assumption, we believe, was erroneous. By virtue of the decrees of the Soviet Government, discussed more fully in the earlier part of this brief, that government acquired title to the surplus funds here in question before the commencement of the State court suits, and at no time has the Soviet Government subjected itself or its property to the jurisdiction of the New York State courts, which therefore acquired or retained no jurisdiction to adjudicate any rights or title to said funds.

A. THE FEDERAL COURT HAS ORIGINAL JURISDICTION OF THESE SUITS

Section 24 (1) of the Judicial Code, as amended, confers original jurisdiction upon the District Courts of the United States to entertain suits brought by the United States. The court below has held, however, that this provision of the Judicial Code is not applicable in respect of a suit brought by the United States claiming title to a *res,* when a State court has theretofore assumed jurisdiction over the *res.*

We, of course, do not dispute the existence of the general doctrine of priority of jurisdiction. We contend, however, that the general rule is not applicable, but is superseded by the specific provision of the Judicial Code, in cases such as these, wherein the actions are brought by the United States. It was so held in *United States* v. *Inaba,* 291 Fed. 416 (E. D. Wash.). In that case an action had been begun in the State court to foreclose labor liens against the crops of a tenant under lease from the United States as trustee for an Indian allottee, and a receiver had been appointed. The United States later brought a suit in the Federal court to foreclose its landlord's lien, and to enjoin the State receivership. A motion to dismiss the suit in the Federal court was denied. It was held that the Federal court had exclusive jurisdiction, and in aid and furtherance thereof the State receivership

was enjoined. The court, after citing Section 24 of the Judicial Code, stated as follows (p. 419):

> * * * the United States, having an interest in the property, may commence and maintain in its own courts such proceedings as may be necessary and appropriate to safeguard and protect its interests, even though such property prior thereto may have been brought within the jurisdiction of a state court for the purpose of adjudicating the rights of private litigants therein, over whom that court has acquired jurisdiction.

An analogous situation was presented in *United States* v. *McIntosh,* 57 F. (2d) 573 (E. D. Va.), in which the United States brought a bill to quiet title to land condemned for a marine corps base, and to enjoin the prosecution of an ejectment suit in the State court against United States officers as custodians of the property. A preliminary injunction was granted. The case arose on a motion to dismiss the injunction. The court considered the case mainly from the angle of the provision of 28 U. S. C. A. 379, forbidding an injunction of State suits except in bankruptcy, and held that the section did not apply where the jurisdiction of the action was solely in the Federal courts. The court held that it had sole and exclusive jurisdiction of the action brought by the United States to quiet its title to the land, and denied the motion to dismiss the injunction.

In *United States* v. *Babcock*, 6 F. (2d) 160 (D. C. Ind., 1925), the United States sought in the Federal court an injunction against the digging of a ditch across Lincoln Highway, a national highway, under a contract which had been authorized by a State court without providing for the replacement of the roadbed, and which would therefore obstruct traffic. In holding that the United States was entitled to this relief, notwithstanding the provisions of Section 265 of the Judicial Code, the court stated, at p. 161:

> While the Judicial Code provides that a writ of injunction shall not be granted in any court of the United States to stay proceeding in any state court, this court is of the opinion that this rule is not intended to apply to an action wherein the United States government is a party, and wherein it is necessary to issue such injunction to protect the interests of the government of the United States. Section 2, article 3, of the Constitution provides, among other things, that the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, and to controversies to which the United States shall be a party. Clearly this provision of the Constitution is intended to give to the federal government [court] jurisdiction, both in law and equity, where the United States is an interested party.

We submit that the ruling of the court below in the instant cases is likewise in conflict with the language which this Court used in *United States* v. *Lee,* 106 U. S. 196, at p. 222, where it was stated:

> Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr* v. *United States,* already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.

Should the decision of the court hereinbelow be affirmed, it would compel the United States, as the only means of asserting its right to this particular property, to enter its appearance in the pending actions in the State court. So to limit the rights of the United States is in practical effect to subject

the United States to suits without its consent. We think the holding of this Court in *United States* v. *Lee, supra,* adequately disposes of this question.

Furthermore, if the doctrine of the decision below should prevail, it is conceivable that in an action pending in a State court involving a *res,* the United States, should it seek to assert its right to such *res,* would, for procedural reasons, be compelled to appear as a party defendant. This Court has said that it is beyond the competence of any officer of the Government to bring in the United States as a party defendant in an action in a State court. *Case* v. *Terrell,* 11 Wall. 199; *Stanley* v. *Schwalby,* 162 U. S. 255. In such a situation, the United States would be powerless to maintain its rights.

We submit, therefore, that the United States must be permitted to select its forum when it asserts its sovereign ownership.

B. THE RULE OF PRIORITY OF JURISDICTION IS NOT APPLICABLE HEREIN BECAUSE (1) THE ACTIONS INSTITUTED BY THE UNITED STATES IN THE DISTRICT COURT ARE ACTIONS IN PERSONAM, AND (2) THE PROCEEDINGS INSTITUTED BY OTHERS IN THE NEW YORK STATE COURTS ARE ALSO IN PERSONAM

(1) In the instant suits, the United States is asking that the respondents account to it for any funds held by them which formerly belonged to the Soviet Government. Obviously, to allow the Federal court to pass upon the right asserted by the

United States would not necessarily affect the State court proceedings, or interfere with the jurisdiction or control over the *res* by the State court. Should the decision of the Federal court be favorable to the claim of the United States, it may be that the United States would be required to prove the claim in the State court proceedings.[21] But it does not follow that the Federal court has no jurisdiction to adjudicate the rights of the United States.

In *Waterman* v. *Canal-Louisiana Bank Company,* 215 U. S. 33, the complainant, a citizen of a different State, brought a bill against the executor and certain legatees, asking to have established her interest in certain portions of the estate. It was held that the Federal court had jurisdiction for the purpose of ascertaining the rights of the complainant to recover as against the executor. This Court stated as follows (p. 46):

> If the Federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the com-

[21] In making such a claim, the United States would not necessarily appear either as a plaintiff or as a defendant, but rather as an intervenor.

> plainant, and to be held in trust for her, thus binding the executor personally, as was the case in *Payne* v. *Hook,* 7 Wall. 425, *supra,* and *Ingersoll* v. *Coram,* 211 U. S. 335, *supra.*

We believe that the court below misconceived the effect of this decision, and that its attempt to distinguish it is untenable. It is argued in the majority opinion that in the *Waterman* case the executor had a personal liability, whereas in this case the depositary has no such personal liability. We submit that, so far as personal liability is concerned, the depositary here is in no better position than was the executor there. The duty of the respondents in each of the present cases is, like that of the executor in the *Waterman* case, to pay over the funds to the parties lawfully entitled thereto. The Federal court has jurisdiction to determine who those parties are. The present suits are *in personam,* even though any rights adjudicated therein may have to be satisfied out of a *res* alleged to be in the possession of the State court. Substantially the same situation existed in the *Waterman* case.

In *Riehle* v. *Margolies,* 279 U. S. 218, in holding that an action in the State court might be maintained to adjudicate a claim against a debtor, concurrently with a proceeding in the Federal court to distribute the debtor's assets, and that the judgment so obtained would be binding in the Federal court, this Court stated (p. 223):

> The contention that the judgment is not conclusive rests upon the argument that, be-

cause the appointment of the receiver draws to the appointing court control of the assets, and in the distribution of them among creditors there is necessarily involved a determination both of the existence of the claim and of the amount of the indebtedness, the Federal court must have the exclusive power to make that determination. The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. Insofar as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. Insofar as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 88–9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. *There is no inherent reason why the adjudication of the liability of the debtor in personam*

> *may not be had in some court other than that which has control of the res.* It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them. (Italics ours.)

The relief sought by the United States in the instant suits is similar to the relief sought by the plaintiff in *Riehle* v. *Margolies, supra.*

In *Allen* v. *United States,* 285 Fed. 678, 683 (C. C. A. 1st, 1923), the defendant, Allen, Commissioner of Banks of the State of Massachusetts, had taken possession of the Prudential Trust Company, which was insolvent. The United States brought a suit in the Federal District Court to establish a preferred claim in connection with the affairs of the Prudential Trust Company on account of the unauthorized deposit of public money in the bank by the Postmaster. The court used the following language (p. 684):

> It is also contended that, because the bank commissioner had taken possession of the property of the trust company, including the property of the United States under authority of the state of Massachusetts, the District Court was without jurisdiction to enter any decree; that the possession of the commissioner was equivalent to or analogous to that of a receiver appointed by the Supreme Judicial Court of Massachusetts, to which, under the statute appointing him, he must make his report. * * *

A citizen of a state other than that in which an estate is being administered may in a federal court establish his right to a share in the estate and enforce such adjudication against the administrator personally or his sureties. *Payne* v. *Hook,* 7 Wall. 425, 19 L. Ed. 260; *Yonley* v. *Lavender,* 21 Wall. 276, 22 L. Ed. 536; *Hess* v. *Reynolds,* 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; *Byers* v. *McAuley,* 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; *Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80; *McClelland* v. *Carland,* 187 Fed. 915, 918, 110 C. C. A. 49. * * *

If a federal court may determine the share of an heir, legatee, or creditor in an estate under administration in a state court, it clearly has jurisdiction to determine, under the allegations in the bill and the admitted facts in this case, whether or not the cash effects in the commercial department of the trust company in the possession of the commissioner of banks is impressed with a trust in favor of the United States and the extent and character of the trust. * * *

We go no further than to determine that these deposits were wrongfully made and unlawfully received and that the total amount of money covered by them was held in trust by the trust company for the United States and came into the possession of the commissioner of banks impressed with this trust, and that, with the claims presented by him to the court of the State of Massachu-

> setts which have been proved, and allowed by him, he should include as an adjudicated claim that of the United States as herein determined.

Allen v. *United States, supra,* was also followed and cited with approval by the Circuit Court of Appeals for the First Circuit in the case of *Chase National Bank of New York* v. *Sayles,* 11 F. (2d) 948, wherein the Court said:

> * * * if the validity of the assignment and the rights of the plaintiffs therein could be determined in the probate court of Rhode Island, that in no way affects the general chancery powers of this or of the District Court, the rights of citizens of different states being involved. *Waterman* v. *Canal-Louisiana Bank Co.,* 30 S. Ct. 10, 215 U. S. 33, 54 L. Ed. 80; *Atwood* v. *Rhode Island Hospital Trust Co.* (C. C. A.), 275 F. 513, 24 A. L. R. 156. The proceeding being of the nature stated, it in no way interferes with the due administration of the estate in the probate court, and any decree which may be entered will operate, so far as the executors are concerned, against them personally. *Allen* v. *United States* (C. C. A.) 285 F. 678, 683, 684.

In *Brown* v. *Duffin,* 13 F. (2d) 708 (1926) (C. C. A. 6th), an accounting suit was begun in the State court. Thereafter a receivership proceeding was instituted in the Federal court. It was held that the State court action was *in personam,* and therefore did not interfere with the receivership proceeding in the Federal court. In

that case, the duty of the defendant was similar to the duty of the respondents in these actions, namely, to conserve the assets and pay them over to those lawfully entitled thereto. The court stated as follows (p. 710):

> There is, however, a third class of suits, in which, though the custody of property is not essential to attain the object of the suit, yet during the progress of the case such custody may become necessary or desirable, as collateral to the full measure of relief, which was primarily sought *in personam*. These cases are only inchoately *in rem*, and the exclusive jurisdiction dates either from the actual taking of possession, or, at the earliest, from some specific request that the court do take possession. We put the *Brown* state court case in this class. It did not ask that the court seize any property. *A judgment in equity that defendant first account, and then pay over, is a judgment in personam.* Yet it showed a body of property with the trustees, for which a receivership might well be later advisable, and the prayer for general relief would have supported such a result. Hence it was, up to the time of filing the Federal bill, a suit *in personam*, and did not bar the general jurisdiction of the federal court. (Italics added.)

This case is clear authority for our contention that the instant suits by the United States for an accounting are *in personam*.

(2) It is submitted that the proceedings in the New York State courts are also *in personam*.

Respondents, however, contend that the proceedings in the State court are supplemental to and a continuation of the original liquidation proceeding instituted and carried out by the Superintendent of Insurance for the protection and payment of domestic creditors and policyholders, and that therefore the pending proceedings in the State court are *in rem*.

Even assuming (contrary to *Farrell* v. *Stoddard* [22]) that the State court acquired custody and control of the property by virtue of the original liquidation proceedings, nevertheless, that court's authority in the liquidation ended when the superintendent had paid the domestic creditors and policyholders. Hence the theory upon which respondents contend that the pending proceedings are *in rem* fails.

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[22] In *Farrell* v. *Stoddard* 1 F. (2d) 802, 803 (1924) (N. D. N. Y.), the court stated as follows:

"An examination of section 63 of the Insurance Law of the state of New York makes it clear that the superintendent of insurance is a public officer in the executive department of the state government and that he still retains his character as a public officer when he acts as liquidator of insurance companies under the provisions of this statute. His power to act as custodian of the *res* comes alone from the statute. The judicial power cannot change or modify this statute, or affect his power in any respect whatever. True, the defendant must first apply to the court for an order to act as liquidator. That, however, merely means that the court must give the signal to start the machinery under which the superintendent, the agent of the executive power, acts. Thereafter the defendant, as the representative of the executive power, pays no heed to the court or its mandates. His chart is the statute under which he acts."

Furthermore, any jurisdiction in the State court, over the *res,* was lost when the State court relinquished the funds and ordered them deposited in the Bank of New York and Trust Company, and the Manhattan Company, as agents and depositaries of the insurance companies, under instructions to pay out only upon the order of "a court of competent jurisdiction." Had the State court intended to retain jurisdiction of the funds, it would have provided that further payments could be made only "upon the further order of this Court."

It is also to be noted that the deposit of the funds in the Bank of New York & Trust Co., and the Manhattan Company, subject to court order as noted above, was an *alternative* to relinquishing the funds to the surviving directors themselves. *Matter of People* (*Northern Ins. Co.*), 255 N. Y. 433, 435. Had the latter course been adopted, it certainly could not be said that thereafter the State court still maintained its custody and control of the *res.*

C. THE STATE COURTS LACKED JURISDICTION TO ENTERTAIN SUITS INVOLVING THE DISPOSITION OF THE FUNDS IN THE INSTANT CASES BECAUSE AT THE TIME SUCH SUITS WERE INSTITUTED THE FUNDS IN QUESTION WERE THE PROPERTY OF A SOVEREIGN WHO HAD NOT CONSENTED TO BE SUED

Even if this Court should not accept the contentions stated above, and should hold that the Federal court does not necessarily have jurisdiction of the instant suits by virtue of Sec. 24 (1) of the Ju-

dicial Code, and hold further that the instant suits, and also the New York State court proceedings, are *in rem*,—nevertheless the rule of priority of jurisdiction is not applicable herein, because the State courts lack jurisdiction over the surplus funds in question, since they were formerly the property of a foreign sovereign, and on November 16, 1933, became the property of the United States.

We submit, therefore, that in order to decide the question of jurisdiction, it is necessary for this Court first to determine whether the Soviet Government by its decrees acquired title to the surplus assets of the dissolved Russian insurance companies remaining after the claims of domestic creditors and policyholders had been satisfied.

The State courts possessed jurisdiction only for the purpose, as stated in the New York statute, of paying the claims of domestic creditors and policyholders, which claims constituted a lien upon the funds. We admit, of course, that the Soviet Government took title to these funds subject to any liens or charges against them which the New York statute created. However, after the Soviet Government acquired title to such property, it was beyond the power of any court or any State officer, without the consent of that government, to place additional charges upon or adjudicate claims against such funds.

It is axiomatic that no nation may be sued without its consent. The property or personal rights of a sovereign cannot be made the subject of litigation in the courts of another nation, unless the

sovereign agrees to be a party to such litigation.[23] Whenever it appears in any litigation that the party defendant or a necessary party in interest is a foreign state or a foreign sovereign, the courts should immediately refuse to assume or retain jurisdiction of the controversy.[24] This is true whether the foreign nation has been recognized or not, by the country before whose courts the litigation is pending. *Wulfsohn* v. *Russian Socialist Federated Soviet Republic,* 234 N. Y. 372, writ of error dismissed, 266 U. S. 580. The foreign sovereign is not required to come into our courts and plead immunity. *Nankivel* v. *Omsk All Russian Government,* 237 N. Y. 150.

It is apparent that at the time the State suits in question were instituted (which had for their purpose the disposition of the surplus assets of the dissolved Russian insurance companies) the funds in question were the property of the Soviet Gov-

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[23] *The Exchange*, 7 Cranch. 116, 137; *Underhill* v. *Hernandez*, 168 U. S. 250; *Porto Rico* v. *Rosaly*, 227 U. S. 270; *DeHaber* v. *Queen of Portugal*, 17 Q. B. D. 171, 196; *Vavasseur* v. *Krupp L. R.*, 9 Ch. D. 351; *The Parlement Belge*, 5 P. D. 197; *Wadsworth* v. *The Queen of Spain*, 17 Q. B. D. 171; *Strousberg* v. *Costa Rica*, 44 L. T. 199; *Oliver Trading Company* v. *Mexico*, 5 F. (2d) 659 (C. C. A. 2d), certiorari denied, 267 U. S. 596; *Mighell* v. *Sultan of Johore* (1894), 1 Q. B. D. 149.

[24] *The Exchange*, *supra; Ex parte Muir*, 254 U. S. 522; *Berizzi Brothers Co.* v. *S. S.* "*Pesaro*", 271 U. S. 562 (1926); *Duff Development Co., Ltd.* v. *Government of Kelantan* (1924), A. C. 797; *Oliver Trading Co.* v. *Mexico*, *supra.*

ernment, which was asserting its ownership, and that the New York courts were apprised of that fact.[25]

Further, it definitely appears that all three Russian insurance companies concerned herein—the Moscow Fire Ins. Co. which purported to maintain the later action against the Bank of New York and Trust Co., the Northern Ins. Co. of Moscow which purported to make the later assignment to the Manhattan Company for the benefit of creditors, and the First Russian Ins. Co. which claims the surplus assets in the hands of the Superintendent of Insurance—were nationalized and ceased to exist as Russian corporations, by virtue of decrees of the Soviet Government, prior to any and all proceedings now pending in the New York State courts. Thus, in one case there was no corporate plaintiff, in the second there was not any corporate assignor, and in the third there was no corporation which could claim the surplus assets in the hands of the Superintendent of Insurance. It therefore results that any proceedings purported to have been instituted by any of these nationalized Russian corporations could not have given the court any jurisdiction, *in rem* or otherwise, over the funds herein concerned.

It follows, we believe, that the courts of New York had no jurisdiction over these surplus funds

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[25] See opinion of Court of Appeals in *Matter of People* (Russian Reinsurance Co.) 255 N. Y. 415, 420, 425; also *Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149.

subsequent to the time that the claims of domestic creditors and policyholders were satisfied. It is, however, unnecessary, for the purpose of these cases, to determine the exact time when the courts of New York ceased to have jurisdiction over these funds, because, in any event, as was suggested by Judge Manton in his dissenting opinion they ceased to have jurisdiction of such funds on November 16, 1933, the date on which the Soviet Government was recognized.

In the light of the fact, therefore, that the courts of the State of New York had lost jurisdiction of the funds in question prior to the time the United States instituted its suits in the Federal court, we respectfully submit that the Federal court has jurisdiction of this action, there existing no proper jurisdiction in any other court.

CONCLUSION

We submit that the decision of the court below is erroneous and should be reversed.

In any event, we submit that the United States is entitled to a review on the merits of the dismissal of the bills of complaint by the District Court, since a ruling on the Government's contention on the merits is prerequisite to a determination of the jurisdiction of the Federal court.

We submit further that even if the decision of the court below is correct, the United States is entitled to a modification of the decree of the District

Court to provide for a dismissal of the bills for want of jurisdiction rather than for insufficiency.

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NOVEMBER, 1935.

APPENDIX

Section 24 of the Judicial Code, as amended (U. S. C., Title 28, Section 41)—

> The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * *.

Section 27, New York Insurance Law—

> *Funds and capital within the United States of corporations organized outside of the United States, transacting in this state, the business of fire or marine insurance.* 1. No insurance corporation organized and existing under the government or laws of any state or country outside of the United States, hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state, shall transact such business therein unless it shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States, as follows: (*a*) If authorized to transact the business of fire insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and three hundred thousand dollars

deposited with insurance departments or state officers or so held in trust; (*b*) if authorized to transact the business of marine insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and one hundred thousand dollars deposited with insurance departments or state officers or so held in trust; or (*c*) if authorized to transact the business of both fire and marine insurance, four hundred thousand dollars deposited with the superintendent of insurance of this state and four hundred thousand dollars deposited with insurance departments or state officers or so held in trust.

2. For all purposes specified in this chapter, the capital of such a foreign insurance corporation now or hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state shall be the aggregate value of all securities and other property within the United States deposited with insurance departments or state officers and held in trust by a trustee or trustees for the protection of all its policyholders within the United States, or all its policyholders and creditors within the United States, after taking from such aggregate value the same deductions for losses, debts, and liabilities in the United States and for unearned premiums on risks therein not yet expired as are authorized or required by the laws of this state or the regulations of the superintendent of insurance with respect to domestic insurance corporations transacting the same kind or kinds of business. * * *

Section 63, New York Insurance Law—

Proceedings against and liquidation of delinquent insurance corporations. This section shall apply to all corporations, associa-

tions, societies and orders to which any article of this chapter is applicable, and to all corporations, associations, societies and orders which are subject to examination under any section of this chapter, or which are doing or attempting to do or representing that they are doing the business of insurance in this state, or which are in process of organization intending to do such business therein, anything as to any such corporations, associations, societies or orders provided in this article to the contrary notwithstanding; and the words "corporation" or "corporations" herein shall also include all such associations, societies and orders as well as all voluntary or unincorporated associations.

1. Whenever any domestic corporation (*a*) is insolvent; or (*b*) has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent, or his deputy or examiner; or (*c*) has neglected or refused to observe an order of the superintendent to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock corporation, or its reserve, if it be a mutual corporation, shall have become impaired, or (*d*) has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society or order, without having first obtained the written approval of the superintendent; or (*e*) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or

(*f*) has willfully violated its charter or any law of the state; or (*g*) whenever any officer thereof has refused to be examined under oath touching its affairs; or (*h*) if such corporation be organized under article six, seven or eight of this chapter, its condition is found, after examination, to be such that it could not meet the requirements for incorporation and authorization specified in such articles, respectively, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which the principal office of such corporation is located for an order directing such corporation to show cause why the superintendent should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

* * * * *

4. Whenever any of the grounds of jurisdiction over domestic corporations specified in subdivisions (*a*), (*b*), (*c*), (*d*), (*e*), (*f*) and (*g*) of subsection one of this section exist or arise with reference to any corporation incorporated by or existing under the government or laws of any country outside of the United States and authorized to transact the business of insurance and having assets in this state; or whenever any foreign corporation so authorized and having assets in this state has been placed in the hands of a receiver *or had its property sequestrated in its domiciliary state or country* [italics ours] or in any other state or country, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in

which such corporation has its principal office for the transaction of business in this state, for an order directing such corporation to show cause why the superintendent should not take possession of its property and conserve its assets for the benefit of its creditors, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

5. On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such corporation and its officers, agents and employees from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or direct the superintendent forthwith to take possession of the property and conserve the assets of such corporation, and retain such possession until, on the application either of the superintendent, the attorney general representing him, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and conduct its business. If, on such application, the court shall direct the superintendent to take possession of the property and conserve the assets of such corporation, the rights and duties of the said superintendent with reference to such corporation and its said assets shall be those heretofore exexercised by and imposed upon anciliary [1] receivers of foreign corporations in this state.

[1] So in original.

Assignment by the Soviet Government to the United States Government

Washington, *November 16, 1933.*

My Dear Mr. President: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

(*a*) judgments rendered or that may be rendered by American courts in so far as they relate to prop-

erty, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(*b*) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM LITVINOFF,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

Mr. FRANKLIN D. ROOSEVELT,
President of the
United States of America,
The White House.

THE WHITE HOUSE,
Washington, November 16, 1933.

MY DEAR MR. LITVINOV: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the

successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(*a*) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(*b*) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics,

and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

Mr. MAXIM M. LITVINOV,

People's Commissar for Foreign Affairs,

Union of Soviet Socialist Republics.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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Nos. 195, 196, and 197

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

BANK OF NEW YORK AND TRUST COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

As the briefs of the three respondents in these actions contain substantially the same arguments, this reply is addressed in general to the arguments

in the three briefs, and specifically to the contentions of the respondent in *United States* v. *Bank of New York and Trust Company.*

EFFECT OF FOREIGN LAW

Respondents rely upon the axiom that the law of one country can have no extraterritorial force *ex proprio vigore* in another country. That general proposition the United States does not dispute. It is, however, the contention of the United States that in the determination of certain legal relationships the courts of this country, in applying our own law, recognize the *effect* of foreign law upon those relationships, and further that this is true even though the property which may be used to satisfy the successful litigant may for some purposes be deemed to have a situs within the United States. This is the principle to which this Court gave approval in the following language in *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527, at page 536:

> That the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but *things done in one country under the authority of law may be of binding effect in another country.* (Italics ours.)

And at page 537:

> A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty" (*Bank of Augusta* v. *Earle,* 13 Pet. 588), though it may do business in all

> places where its charter allows and the local laws do not forbid. *Railroad* v. *Koontz,* 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel,* 103 U. S. 226), and the charter is the same abroad that it is at home. * * * Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.

As in the *Gebhard* case, the legal relationships involved in the instant actions are rights in and to the property of a foreign corporation. Canadian law was held to govern the rights asserted in that case; so should Russian law be held to govern the rights asserted in these actions. In the following additional cases, in which the property of the debtor was found within the jurisdiction, the court gave effect to the primary obligation as interpreted by the foreign law which created the obligation:

Deutsche Bank v. *Humphrey,* 272 U. S. 517, where the measure of damages was held to be the same under our law as under German law at the time of the commencement of the action;[1]

Zimmerman v. *Sutherland,* 274 U. S. 253, where an obligation created by Austrian law and extinguished by Austrian law was held unenforceable;[2]

[1] See petitioner's main brief, p. 45.

[2] See petitioner's main brief, p. 46.

Dougherty v. *Equitable Life Assurance Society*, 266 N. Y. 71.

Lazard Bros. & Co. v. *Midland Bank, Ltd.* (1933) A. C. 289, where it was held that a British creditor of a dissolved Russian corporation could not reach the assets of that corporation in England, since no judgment could be obtained against the corporation after its dissolution by Russian law.[3]

The effect of Russian law on the assets of these Russian corporations was recognized in the majority opinion in the Circuit Court of Appeals in the following language:

> It [the Russian State] could, and did, acquire for itself every right the corporation in Russia possessed. *It became the corporation there so far as we are now concerned.* It had all its property and rights as fully as though the corporation had lawfully assigned them to it before dissolution. *To that extent our public policy as to confiscatory decrees, so far as it may be expressed by our courts, is of no moment.* When the executive branch recognized the Soviet Government, the judicial branch became bound to recognize the validity of Soviet decrees in Soviet territory from the beginning of the Soviet regime. [Citing cases.] Consequently we must for present purposes take *the Soviet Government to have become* to all intents and purposes *the Russian insurance corporation in Russia which owned the deposit in New York* subject to the fulfillment

[3] See petitioner's main brief, pp. 31–33.

> of the conditions upon which the deposit was made with the New York Superintendent of Insurance. (Italics ours.)

THE FIFTH AMENDMENT

Respondents also contend that the Fifth Amendment constitutes a declaration of public policy to the effect that no person, including an alien, shall be deprived of his property through a foreign statute characterized as "confiscatory", and that therefore the legal relationships between a Russian corporation and creditors and stockholders of that corporation, which were altered by such statutes, must be regarded as unaffected thereby. And further they contend that persons possessing rights against these corporations, before the alteration of these rights by Russian law, must be permitted to assert them in the United States against an American debtor.

In reply to these contentions it must be noted that the Fifth Amendment constitutes a limitation on the powers of Congress and that it does not constitute a declaration of public policy in respect to the enforceability of rights in instances, like those presented in these cases, in which these rights were originally created by the law of a foreign sovereign and were subsequently extinguished or changed by the same law. In these actions no statute passed by Congress is involved. The Fifth Amendment has, therefore, no application. The very language quoted by the respondents from *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492:

> The provision that private property shall not be taken for public use without just compensation establishes a *standard for our Government* which the Constitution does not make dependent upon the standards of other governments. The Act of Congress should be interpreted in the light of its manifest purpose to give effect to the constitutional guaranty. (Italics ours.)

makes it clear that in so far as concerns the taking of private property our government and foreign governments may each choose their own standards.

"CONFISCATION"

Respondents have also argued that the title of the United States to the funds in question is unenforceable because it is a title based upon laws of the Soviet Union which are characterized as "confiscatory." In so arguing they postulate that the title of the Soviet Government to these funds is no better than a robber's possesison. This view overlooks the fact that the acquisition by the Soviet Government of all private property wherever situated owned by Russian nationals was an essential feature in the establishment for the Russian people of a theory of government, never before attempted on a comparable scale, and based upon national ownership, rather than private ownership, of the national wealth. The property so acquired was, according to these economic theories, to be employed in the furtherance of the national welfare. Clearly, a title acquired under such circumstances

cannot be dismissed by invoking a doctrine based upon the protection of private citizens against larceny. The Court of Appeals of New York rejected the same contention in the following language in *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, at page 83:

> In Russia, where all these insured were, with one or two exceptions, these decrees were laws to be obeyed. They were the laws of their government. *As to them the Soviet Republic was no body of bandits, confiscating property, but an existing government, carrying out new theories of insurance.* If the Russian people, under their Soviet form of government, determined to abolish all private insurance for their citizens and establish a system of social protection by the State, that was their affair, not ours, and however objectionable we may consider the monopolization of all business, including insurance and banking, and the conduct of it thereafter by the government, we at least must admit that other peoples can try the experiment if they desire. (Italics ours.)

THE PUBLIC POLICY OF NEW YORK

Respondents also contend that there is a public policy of the State of New York which requires that any and all assets owned by a foreign corporation and found within the state shall be applied to the satisfaction of any and all claims asserted thereagainst, regardless of the nature of the claims and where they arose. As supporting their contentions, each of these respondents has deemed it appropri-

ate to cite an excerpt from the decision of the New York Court of Appeals in *Matter of People* (*City Equitable Fire Ins. Co.*), 238 N. Y. 147, 156.[4] It is stated in the *Bank of New York* brief, at p. 19:

> As said by the Court of Appeals in *Matter of People, City Equitable Fire Insurance Company* (238 N. Y. 147, 156) in speaking of a *foreign* insurance corporation taken over by the Superintendent of Insurance under the provisions of Section 63 of the Insurance Law:
>
> "The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this State or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose."
>
> (Italics ours.)

The court was not there referring to a foreign corporation. In using that language, the court was speaking of the situation with respect to the liquidation of *domestic* corporations, as covered by Section 63 of the insurance law. The case actually concerned what should be done with the surplus assets of the City Equitable Fire Ins. Co., a *foreign* corporation. And the opinion, therefore, proceeds to deal precisely with that question, using the fol-

[4] This excerpt is quoted in the brief of the *Bank of New York and Trust Company* at pages 19 and 51; in the brief of the *Manhattan Company* at page 27; and in the brief of *Pink* at page 36.

lowing language, to which respondents make no reference (p. 156):

> In the case of a foreign corporation the liquidation may be but partial. The funds deposited with the Superintendent are primarily for the benefit of its policyholders in the United States. Having realized on these funds, having taken possession of all the assets of the corporation within his reach, having satisfied the claims of such policyholders and of local creditors, what is he to do with the surplus? We think the statute implies the necessary answer. He is an ancillary receiver of a foreign corporation. The very word "ancillary" means subordinate or auxiliary to the principal. * * * He is, therefore, "to assume administration in aid of the primary receiver." * * * *If there remains a surplus in his hands after all proper charges and claims have been deducted this must be transferred to the receiver of the domicile.* (Italics ours.)

The decision of the court was as follows (p. 158):

> We hold that under that section [63] once the Superintendent has taken possession of the assets of a foreign insurance corporation, no lien by attachment may be acquired upon these funds, and that when the trust confided to him has been fully administered any surplus remaining must be transmitted by him to the officer at the corporation's domicile having general control of the winding up or dissolution of such corporation.

This case was followed in *Matter of People (Norske-Lloyd Ins. Co.)*, 242 N. Y. 148, which involved the surplus assets of a Norwegian corporation.

We submit, therefore, that the general rule, under New York law, as under the law of other States, is that when domestic claims have been satisfied, any surplus remaining must be remitted to the domiciliary liquidator.

This rule has been adopted in *Restatement of Conflict of Laws*, Sec. 161, as follows:

> If a statute of the state of incorporation which is in force at the time of the dissolution of a corporation provides that all its assets shall, upon dissolution, pass to a person designated in the statute, the right of such person to the personal property, wherever situated and whether tangible or intangible, will be recognized and given effect by other states, and the designated person can bring suit in any State upon claims due to the corporation.

In connection with the insurance companies involved in these cases, however, the Court of Appeals ruled in its decisions in 1931 that there was no domiciliary liquidator whom it could recognize, in view of the nonrecognition of the Soviet Government by the United States Government. Hence the Court of Appeals felt impelled to make a limited exception to the general rule, and therefore instructed the Superintendent of Insurance to liquidate any foreign claims which were presented

within a certain time; but in the same decisions it was stated that after that time, the Superintendent and our courts should have no further responsibility for the disposition of these assets.

Since recognition of the Soviet Government, the practical difficulty which the New York court faced in 1931 no longer exists. Hence there is no longer any reason why the general rule of New York, as laid down in the *City Equitable* case, cannot be or should not be followed.

In regard to the First Russian Insurance Company, the New York Court of Appeals said, in 255 N. Y. at 427:

> The surplus assets in this State are but a part of the total assets to be administered abroad. We disclaim a continuing duty of visitation and supervision. * * * Our administrative machinery should be no longer clogged, our liquidator no longer burdened, our courts no longer vexed, with problems not our own.

On pages 18–19 of the *Bank of New York* brief appears the following statement:

> It is the law and public policy of the State of New York that upon the dissolution of a corporation its assets are not subject to confiscation or escheat but are to be regarded in equity as the property of the corporate creditors and shareholders, and are to be administered and distributed as such.

To support this proposition five cases are cited. All of these cases concern corporations organized

under the laws of New York. Whether the above statement is or is not supported by these authorities, and whatever may be the theory the New York Courts have adopted as to the ownership of corporate property after the dissolution of a New York corporation, we submit that this theory has no application to the determination of rights in the surplus assets of a dissolved Russian corporation merely because that corporation happened to have in New York in 1925 more assets than were required to respond to the claims of its domestic creditors.

Hence there is no public policy or law of the State of New York that claims of Russian nationals against the Russian Government shall be enforced against assets in the State of New York. On the contrary, we submit that if there is any public policy involved herein, it is all in favor of upholding the title of the United States to these surplus funds. The assignment clearly states that it is made "preparatory to a final settlement of the claims and counterclaims between the governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals." The action of the United States Government in accepting this assignment was therefore in furtherance of its policy to protect American interests in connection with claims arising out of the revolution in Russia.

THE SITUS OF THE SURPLUS ASSETS

Respondent Bank of New York (at pages 9–13) argues that since legal title to the assets of Moscow Fire Insurance Co., prior to the possession of them by the Superintendent of Insurance, was in New York domiciliaries, and that only an equitable title in the surplus assets (i. e., assets not required to respond to the claims of creditors based on domestic transactions) was possessed by the Russian corporation, the situs of this property for all purposes and at all subsequent times must be deemed to be New York. The record does not disclose whether or not at the time the Superintendent of Insurance took possession the legal title to all of the assets of this Russian corporation in New York was or was not vested in New York domiciliaries. But even assuming the accuracy of respondent's statement, it by no means follows that the equitable interest possessed by the Russian corporation in the surplus assets could not have a situs in Russia for the purpose of transfer of title to this equitable interest, as between the Russian corporation and the state which created it. The Court of Appeals of New York, in *Severnoe Securities Corp.* v. *London and Lancashire Ins. Co.*, 255 N. Y. 120, stated as follows at page 123:

> The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the credi-

> tor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found [citing cases] * * *. What we are to determine in the case at hand is the locality to be chosen for the exercise by conservators of powers born of an emergency. For that purpose, if not for others, the situs of the chose in action, the subject of this claim, is in England and perhaps in Russia, but certainly not here.

The same court in *Russian Reinsurance Co.* v. *Stoddard,* 240 N. Y. 149, stated at page 167:

> We have pointed out that the existence of the corporate plaintiff, its right to sue, the authority of the directors and *the devolution of title to its assets* must all be determined by the Russian law.

JURISDICTION OF NEW YORK COURTS OVER THE PENDING ACTIONS

Contrary to its position in its briefs in the courts below and in its brief in opposition to the petition for certiorari, respondent Bank of New York (pp. 44–45) now refers to the state court proceedings commenced in April 1933 as a suit instituted by Paul Lucke, to whose name as plaintiff "was added the name *Moscow Fire Insurance Co.*" This is a belated attempt to make this action appear what it is not, namely, an action brought by a plaintiff having a legal existence. The plaintiffs in that action, according to the complaint (R. p. 12), are "Moscow

Fire Insurance Company and Paul Lucke, as sole surviving director of Moscow Fire Insurance Company, and Conservator of its property." In April 1933 Moscow Fire Insurance Company had been legally nonexistent for many years. Consequently, it could not by appearing as a plaintiff in New York courts give those courts jurisdiction, whether *in rem* or *in personam,* over the subject matter of the action. Paul Lucke, as a representative of the corporation, whether as surviving director or as Conservator, had no more legal capacity as a representative of the corporation than had the corporation itself. His status as surviving director had been terminated many years previously by the law of Russia, and the New York court had no power to name him conservator of any property formerly owned by this corporation in New York. *Issaia* v. *Russo-Asiatic Bank,* 266 N. Y. 37.

It clearly appears, therefore, that the "Lucke suit" is one over which the New York courts had no jurisdiction. It is immaterial, therefore, to determine whether that suit is *quasi in rem* (as stated on page 45 of respondent's brief) or *in rem* (as stated on page 49 of respondent's brief), or whether it is *in personam.* In any event, it is not an action to which the rule of priority of jurisdiction can apply.

Respondent Manhattan Co. asserts at page 12 of its brief:

> In the instant case the defendant acquired title to the fund in suit as the result of an

> assignment by the Northern Insurance Company of Moscow, to wit, in 1932, more than a year prior to the recognition of the Russian government.

In 1932, however, the Northern Insurance Company of Moscow had ceased to exist for many years. Consequently, not having at that time title to any assets, it could not transfer title to the respondent bank.

In *Relfe* v. *Rundle,* 103 U. S. 222, a receiver had been appointed in Louisiana by a state court who had possession of Louisiana assets of a Missouri insurance corporation. Thereafter the statutory successor of this corporation by Missouri law intervened in the Louisiana action, and sought to remove it to a Federal court. In opposition to this removal it was urged that the prior possession of the state court could not be disturbed. In holding that removal was proper under these circumstances, this Court stated, at pp. 224–226:

> We think the Circuit Court erred in remanding the cause. The entire controversy is between the appellees, representing the Louisiana creditors and policy-holders, on one side, and Relfe [Missouri statutory successor], the statutory representative of the corporation and its property, on the other, as to their respective rights to what the appellees claim are Louisiana assets belonging primarily to Louisiana creditors. Fell and the receiver of the Columbia Life Insurance Company are formal parties only. Fell

> [Louisiana receiver] has in his possession, as a naked trustee, some of the Louisiana assets, and the receiver of the Columbia Life Insurance Company is, so far as anything appears, no more than a general creditor of the dissolved corporation whom, necessarily, under the law, Relfe represents. After the decree of dissolution the Life Association Company had no longer any corporate existence, and the temporary agency and receivership of Frost was ended when the property of the corporation was transferred to Relfe and he became under the law entitled to the possession.
>
> * * * * *
>
> Relfe, therefore, became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana. He was, in legal effect, their only opponent in the suit they had begun, and as he appeared in time and was a citizen of Missouri, representing a Missouri corporation, he was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the courts of the United States.

DECISIONS IN ENGLAND

Respondent Bank of New York (p. 30), seeks to distinguish the decision of the House of Lords in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (1933), A. C. 289, by stating that it was not concerned with the ownership of assets outside of Russia of a dissolved Russian corporation. This decision, how-

ever, annulled a judgment which would have permitted the plaintiff to recover a cash balance in favor of a Russian Bank on the books of an English Bank. It will thus be seen that the decision bore directly on assets of a Russian corporation situated in England.

A further effect of this decision is, in substance, to overrule previous decisions of the House of Lords and of other English courts on which the three respondents rely.[5] These cases are *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1925) A. C. 112, *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (1925) A. C. 150, and *Employers' Liability Assurance Corporation, Ltd.*, v. *Sedgwick, Collins and Company, Ltd.* (1927) A. C. 95. Likewise, the decision impairs the authority of *The Jupiter* (1927) P. 122, aff'd (1927) P. 250, in that the courts in the latter decision had adjudicated the effect of Soviet decrees on a vessel situated outside of Russia, in reliance upon previous House of Lords decisions which the *Lazard* case overruled. One of the grounds for the decision in *The Jupiter, supra,* was that before the assertion of ownership over the vessel by the Soviet Government, title to it had been vested in a French official, by the decree of a French court having jurisdiction over the vessel. The latter's title was held valid as against the title derived through a subsequent seizure by the

[5] See petitioner's main brief, p. 33.

Soviet Government. Neither of the grounds on which the decision in *The Jupiter* were placed is therefore relevant in the instant actions.

In the only cases in English courts in which the Soviet Government appeared as the plaintiff, as successor to prior Russian governments, to recover property situated in England, it was permitted to recover. These cases are *Union of Soviet Republics* v. *Belaiew*, 42 T. L. R. 21 (K. B. 1925), and *U. S. S. R.* v. *Onou*, 69 Sol. J. 676 (1925).

CONCLUSION

We submit that the decision below is erroneous and should be reversed.

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DECEMBER 1935.

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IN THE

Supreme Court of the United States

October Term, 1935

No. 195

UNITED STATES OF AMERICA

Petitioner

v.

BANK OF NEW YORK AND TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

FREDERICK B. CAMPBELL
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BANK OF NEW YORK AND TRUST COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Report of Opinions Below

The opinion of the District Court (R. 164) is reported in 10 Fed. Supp. 269; the opinions of the Circuit Court of Appeals (R. 185) have not yet been reported.

Questions Presented

The case below presented the following questions:

1. Whether the District Court had jurisdiction of the cause of action asserted by petitioner, the N. Y. state

courts having assumed jurisdiction and actual or constructive possession of the funds in controversy long prior to the bringing of the instant suit.

2. Whether the federal courts will give extraterritorial effect to the Soviet decrees of confiscation over property situated within a state of the United States, and especially where the highest court of the state where such property has always been situated has denied extraterritorial effect to such Soviet decrees as contrary to its public policy.

3. Whether, by the diplomatic proceedings of November 16, 1933, between the President and the representative of the Soviet government, the title to the property here in question has been validly assigned to and accepted by the petitioner.

4. Whether the complaint, in any aspect, sets forth a cause of action in equity cognizable in a federal court against the respondent, a mere bailee.

The Decisions Below

The Circuit Court of Appeals, by a majority, has decided question 1 in the negative. The District Court has decided questions 2 and 3 in the negative. The dissenting opinion in the Circuit Court of Appeals would answer all three questions in the affirmative. Question 4 has not been decided by either of the courts below.

The opinion of the dissenting judge of the Circuit Court of Appeals is based entirely upon his present view

that the Soviet decrees of confiscation, by virtue of our recognition of Soviet Russia, retroactively and extraterritorially vested the Soviet government with title to the assets of United States branches of Russian corporations, although such assets were never within the territorial jurisdiction of Russia but had always been located within the territorial jurisdiction of the State of New York (R. 202-205). Such views are directly contrary to the previously expressed views of the same judge (*Lehigh Valley R. Co.* v. *State of Russia,* 21 Fed. (2d) 396, 401; certiorari denied, 275 U. S. 571) where, speaking for the entire court, he said: "It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition. Acts theretofore performed outside of its own territory cannot be validated by recognition."

Statement

Long prior to the time when the instant suit was commenced (August 22, 1934), the fund which the complaint herein sought to obtain had been taken into the custody of the Supreme Court of the State of New York, and at the time of the beginning of such suit such fund was still in the control of such state court in liquidation proceedings and proceedings supplementary thereto, the object of which was to determine the disposition of such fund (R. 6, 22, 50, 74, 78, 99-104) in the manner directed by the highest court of the state, speaking by Chief Judge Cardozo (*Matter of People—Moscow Fire Ins. Co.*, 255 N. Y. 433; R. 50, 22-34). The fund had been first taken into the actual possession of the state court through the medium of the appointment of the Superintendent of

Insurance as liquidator of the property in the state of Moscow Fire Insurance Company, a former Russian corporation, pursuant to state statute (*N. Y. Ins. Law*, sec. 63, subd. 5), in a proceeding in the state court for such purpose (R. 50, 99). In the course of such proceeding, the New York court of appeals in February 1931 directed that the surplus assets of the United States branch of the Moscow Company, remaining after payment of all just claims, either filed with the Superintendent of Insurance or prosecuted by attachment, should be paid to Paul Lucke, the sole surviving director of the company, as conservator of the property of the company, upon condition that he file a bond conditioned that he would faithfully apply the assets to the use of the creditors and shareholders of the Moscow Company. As an alternative to the giving of the bond, it was further provided in the decision of the Court of Appeals and in the order of the Supreme Court on remittitur from the Court of Appeals that, upon the election of the Moscow Company and its surviving director and conservator, the surplus funds should be released, paid, transferred and delivered to the respondent herein, as agent or depositary of the Moscow Company and of Paul Lucke, as surviving director and conservator, upon the filing of a written stipulation of the Moscow Company and of Paul Lucke as such surviving director and conservator that the surplus assets or fund would not be withdrawn except upon the order of a court of competent jurisdiction (R. 52-55, 99-101; *Matter of People, etc.*, 255 N. Y. 433; also related case of *Matter of People, etc.*, 255 N. Y. 415). Pursuant to the order of the New York Supreme Court (R. 50) entered as directed by the New York Court of Appeals (*supra*) in

such proceeding, such fund was deposited on April 18, 1933, with the respondent bank as the agent or depositary of the Moscow Company and of Paul Lucke as surviving director and conservator thereof by the New York Superintendent of Insurance as liquidator, on condition as directed by such order, that such fund was not to be withdrawn except upon the order of a court of competent jurisdiction (R. 55). Immediately thereafter, on April 19, 1933, there was begun in the New York Supreme Court a supplementary suit, the object of which was to determine the disposition of such fund (R. 22-34). Such supplementary suit had proceeded to judgment on the very day (August 22, 1934) the instant suit was brought (R. 78, 103).

The instant suit was brought by petitioner as alleged assignee of the alleged title of the Soviet Republic under its decrees of confiscation to recover the whole of the funds in the control of the state court, although the instant complaint is dressed up to look like a suit in personam. With the exception of the order of the state court entered on remittitur from the Court of Appeals, as above mentioned, the instant complaint studiously omits reference to the state court's acquired control of the funds although there was inserted in the complainant's affidavit for injunction the summons and complaint in the supplementary liquidation proceedings in the state court (R. 15, 22-34).

Although probably immaterial, there is no justification for petitioner's statement on page 5 of the petition to the effect that the petitioner filed its bill of complaint herein prior to the entry of the above mentioned judgment of the state court. Such judgment was entered and the instant suit commenced on the same day. The record does not

indicate the hour of the day in either case, but it does appear that the subpoena herein was not served upon the respondent bank until the day following, August 23rd (R. 1).

During the period of such extensive proceedings in the courts of the state of New York to liquidate the fund and distribute it according to its laws, the highest court of the state repeatedly held, subsequent to recognition as well as before, that these very confiscatory Soviet decrees upon which petitioner relies were contrary to the public policy of the State of New York, shocking to its sense of justice, and would not be enforced in its courts; and that by the decrees relied upon by the petitioner the Soviet government acquired no title to any such assets in the State of New York of the former Russian corporations (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378-379; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 90, 108-109; *James* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 257.

That the Soviet decrees are confiscatory in their nature is specifically alleged in the complaint (R. 5); is shown by the decrees themselves (R. 63, 65); and is so held by all the opinions below (R. 168, 185, 204). The petition, however, studiously omits reference to the Soviet decrees as decrees of confiscation, but speaks of them merely as decrees of appropriation.

ARGUMENT

1

Jurisdiction

The first state court proceeding, in which the Superintendent of Insurance was the statutory liquidator of the Moscow Fire Insurance Company, was clearly a proceeding in rem. The subsequent and supplemental suit in the state court, instituted in the name of the Moscow Company and its surviving director Paul Lucke as conservator, pursuant to the direction of the highest state court in the first proceeding, for the purpose of obtaining a judicial determination of the disposition to be made of the surplus funds and securities then in the custody of the respondent as bailee, was likewise a proceeding in rem. (*Kline* v. *Burke Construction Company*, 260 U. S. 226, 231). The instant suit, brought long subsequent to the institution of the state court proceedings for the purpose of asserting a claim to the whole of the funds in the custody of the state court, is likewise in rem, or quasi in rem. Under these circumstances, the Federal District Court was without any jurisdiction at all (*Penn General Casualty Company* v. *Pennsylvania ex rel. Schnader*, 294 U. S. 189). Especially is this so since the claim of the petitioner was actually filed (R. 105, 155) in the state court proceeding, although not there pressed (*Peoples Trust Company* v. *U. S.*, 23 Fed. (2d) 381; *Merryweather* v. *United States*, 12 Fed. (2d) 407; *United States* v. *American Ditch Association*, 2 Fed. Supp. 867). Even if the District Court had had jurisdiction, such jurisdiction

should be relinquished to the state court (*Penn General Casualty Company* v. *Pennsylvania ex rel. Schnader, supra*).

The state court having first taken jurisdiction over the *res*, the District Court clearly has no jurisdiction over the *res* or to direct the respondent to account (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). The instant complaint does not and cannot seek to establish any personal liability against the respondent, a mere custodian. Consequently, there is no right in personam which can be determined and enforced in the instant suit within the principles set forth in the *Waterman* case.

The jurisdiction of the federal courts in cases wherein the United States is a party, is not an exclusive jurisdiction, and consequently the state court had undoubted jurisdiction to determine the claim of the United States as actually filed in the state court proceedings but not pressed therein. (*Cotton* v. *United States*, 11 How. 229, 231; *Claflin* v. *Houseman*, 93 U. S. 130, 136; *Peoples Trust Co.* v. *United States*, 23 Fed. (2d) 381; *Merryweather* v. *United States*, 12 Fed. (2d) 407.)

The state court having acquired control of the *res* and having assumed jurisdiction to administer it, the United States, like any other party litigant, is bound by the numerous decisions of this Court to the effect that the jurisdiction of the court first in control will be protected. That the United States as a party litigant in commercial matters is bound by the rules governing other litigants, has frequently been decided by this Court (*Standard Oil Company* v. *United States*, 267 U. S. 76; *United States* v. *The Thekla*, 266 U. S. 328; *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 126; *Cooke* v. *United States*, 91 U. S. 389, 398).

In support of its contention that the District Court had jurisdiction of the instant suit notwithstanding the prior pendency of the state court proceedings, the petitioner cites only two District Court decisions, neither of which, it is submitted, have any application to the situation in the instant case. In the case of *U. S.* v. *McIntosh,* 57 Fed. (2d) 573, relied upon by the petitioner, it appears that the United States was acting in its sovereign capacity as the owner and operator of a marine base which it had purchased pursuant to an Act of Congress, and that the State of Virginia, in which the premises were located, had relinquished to the United States all jurisdiction over the premises in question. Likewise, in the case of *United States* v. *Inaba,* 291 Fed. 416, relied upon by petitioner, the United States was also acting in a sovereign capacity as trustee for its Indian wards. In cases involving lands allotted to the Indians, the jurisdiction of the federal courts has always been paramount.

The case of *United States* v. *Lee,* 106 U. S. 196, relied upon by the petitioner, is not concerned in any respect with questions of conflicts of jurisdiction between the state and federal courts.

The case of *Riehle* v. *Margolies,* 279 U. S. 218, further relied upon by the petitioner, has no application for the reason, as hereinbefore pointed out, that the petitioner in the instant case is not seeking to recover and cannot recover a personal judgment against the respondent. Moreover, in the *Riehle* case, the state court suit was commenced prior to the institution of the receivership proceedings in the federal court, and all that this Court decided was that the creditor had a right to prosecute to judgment such suit against the debtor in personam.

2

Confiscation and Public Policy

The funds in question being within the State of New York and the highest court of the state having declared the admittedly confiscatory decrees of the Soviet government to be against its public policy and unenforcible in its courts (see Statement): under such circumstances the duty of the Federal District Court in New York is simply to administer the law of the State of New York as so declared by its highest court, and the district court is without power to review the holding of the state court or to enforce such Soviet decrees over property within the State of New York (*Clark* v. *Williard,* 294 U. S. 211; 213; *Same* v. *Same,* 292 U. S. 112, 123; *City Bank Co.* v. *Schnader,* 293 U. S. 112, 118-119; *Burnet* v. *Brooks,* 288 U. S. 378, 399; *Pennoyer* v. *Neff,* 95 U. S. 714, 722).

But irrespective of the foregoing, the Soviet decrees of confiscation are contrary to the public policy of the United States, and the federal courts will not enforce such decrees over property within the jurisdiction of our courts and which has always been located here (*5th Amendment; Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 491-492; *Baglin* v. *Cusenier,* 221 U. S. 580; *Bank of Augusta* v. *Earle,* 13 Pet. 519, 589; *Second Russian Ins. Co.* v. *Miller,* 268 U. S. 552, 560).

No case has been cited nor can be cited where any court of this country has upheld a title based on confiscation except a case—not such as the instant case—where the property confiscated was within the territorial jurisdiction of the confiscating government.

Recognition, even if coupled with the alleged acceptance by the President of an assignment of all Russian governmental claims to property in the United States, did not authoritatively determine that the Soviet confiscation decrees were not against the public policy of the United States. The Executive act represented by the acceptance of the "Litvinoff" assignment, even if regarded as an act within the treaty power, does not determine public policy contrary to express prohibitions of the Constitution (*Geofroy* v. *Riggs*, 133 U. S. 258, 267; *The Cherokee Tobacco*, 11 Wall. 616, 620-621). The Executive, having no authority in peace or war (*Brown* v. *United States*, 8 Cranch 110; *Miller* v. *United States*, 11 Wall. 268, 310) to confiscate property, it follows that the Executive has no power by indirection to override our public policy by an alleged acceptance of title to property in the United States based upon the confiscatory decrees of a foreign government. The question of public policy in such a case as this is for the courts, not the Executive.

While our courts, in cases which do not violate our public policy, usually recognize the transfer of title to personal property according to the law of the domicile, and while the legal relations of the members of a corporation to the corporation and to each other are regulated and controlled by the law of the jurisdiction in which the corporation is organized (*Second Russian Ins. Co.* v. *Miller*, 268 U. S. 552, 560), nevertheless such rules of comity or of necessity can have no application over property within our jurisdiction where the alleged transfer at the domicile is by confiscation or other method in violation of our public policy as declared in our fundamental law. And so in the case of *Canada Southern*

R. Co. v. *Gebhard* (109 U. S. 527; see *Second Russian Ins. Co.* v. *Miller, supra*), so much relied on by petitioner in the courts below, this Court, while recognizing the application of the law of the corporation's alien domicile to bonds of the corporation held in the United States, was careful to point out that such law was in harmony with the spirit of our own bankruptcy and foreclosure laws, and so not opposed to our public policy.

The fact that by the Soviet decrees Russian insurance corporations were nationalized and liquidated has nothing whatever to do with the question of petitioner's alleged title to the funds in question. At most the Soviet Republic became the statutory successor of the nationalized Russian corporations. As such statutory successor it could obtain no title to corporate assets located in the United States contrary to the law and public policy of the sovereignty having physical control of such assets (*Clark* v. *Williard*, 294 U. S. 211).

3

The "Litvinoff" Assignment

If the Soviet government obtained no title by its decrees of confiscation which our courts will enforce, then of course the assignment is inoperative (*United States* v. *Buford*, 3 Pet. 12, 30).

But beyond this, the title asserted to this property can not be said to have been accepted by petitioner through the act of the President. In the case of diplomatic assignments affecting non-enemy nationals, private property of nationals of the assignor government always will be recog-

nized and protected (*U. S.* v. *Percheman*, 7 Pet. 51, 86-87; *Strother* v. *Lucas*, 12 Pet. 410, 438; *Coffee* v. *Groover*, 123 U. S. 1, 9; *Kinkead* v. *U. S.*, 150 U. S. 483). Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals (*Sullivan* v. *Kidd*, 254 U. S. 433, 439), and it is expected that their provisions will be expressed in unmistakable terms (*Rocca* v. *Thompson*, 223 U. S. 317, 332).

The assignment undoubtedly covered amounts due the Soviet government as the successor of prior governments of Russia. Contrary to the assertion of the petitioner, this was all that was held in the case of *State of Russia* v. *National City Bank*, 69 Fed. (2d) 44. But petitioner claimed in the courts below that the additional words "or otherwise" (R. 42, 44) include the claim in suit. If this be so then a claim of any kind, however based upon any one of the many, unique shall we say, decrees of the Soviet government, is to be deemed to have been accepted by the petitioner as a collection agent, with the consequent responsibilities and liabilities. The assignment should not be so construed (see opinion of District Court, R. 171-172). In the aspect most favorable to the petitioner such assignment is ambiguous, and no such extensive liabilities should be founded upon such ambiguity in view of the principles laid down by this court as above indicated.

4

The complaint fails to state a cause of action in equity.

The allegation that the funds were delivered to the respondent "as agent or depositary of the Moscow Fire

Insurance Company, said fund not to be withdrawn except upon an order of a court of competent jurisdiction" (R. 6) does not show such an express or implied trust relation between the respondent and the Moscow Company as to confer jurisdiction upon a court of equity (*Young* v. *Mercantile Trust Co.*, 140 Fed. 61; aff'd 145 Fed. 39, 2d Circ.; *Tuckerman* v. *Mearns*, 262 Fed. 607, 610; *Adams* v. *Jones*, 11 F. (2d) 759, 760; certiorari denied, 271 U. S. 685). Respondent is a mere bailee.

CONCLUSION

The principles of law applicable to this litigation and applied by the courts below have long been well settled. The record raises no question of merit deserving of review on certiorari.

Respectfully submitted,

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July, 1935.

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No. 195

IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA,

Petitioner

v.

BANK OF NEW YORK AND TRUST COMPANY

MEMORANDUM FOR RESPONDENT IN ANSWER TO "SUPPLEMENT" TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK B. CAMPBELL
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Upon the very day of the reassembling of the Court, petitioner served what purports to be a "supplement" to the petition filed on July 8, 1935 and replied to on July 27, 1935. Respondent's counsel know of no authority supporting such practice in reopening the argument. If such "supplement" is to be received and considered, respondent asks that the following observations in answer thereto be likewise received and considered.

I

Jurisdiction

It is the respondent's position, as held by the court below (R. 188-189), that the pending state court suit, instituted by Paul Lucke prior to the instant suit, is a suit quasi in rem, having for its sole object the disposition of the property in question (R. 32); that the instant suit by the petitioner, asserting a claim to the whole of the same property, is a suit quasi in rem notwithstanding a prayer for an accounting which is improper if the prior state court suit is one quasi in rem (*Waterman* v. *Canal-Louisiana Bank,* 215 U. S. 33, 44-46); that hence there is applicable the doctrine of priority of jurisdiction in suits quasi in rem, and the federal district court was without jurisdiction of the instant suit. Petitioner's "supplement" (pp. 17-21) challenges respondent's position upon certain grounds which respondent herewith answers.

Petitioner's "supplement" (p. 2) states that respondent apparently concedes that if the property in question formerly belonged to the Soviet government and now belongs to the United States, "the state courts are without jurisdiction over that property." Respondent not only does not so concede, but expressly challenges the contention. The questions of jurisdiction and of the existence of a cause of action are distinct. Respondent contends that the state court, prior to the

beginning of the instant suit, had jurisdiction over the property in question irrespective of the effect of the Soviet decrees.

Petitioner asserts that the doctrine of priority of jurisdiction is not applicable to the situation here presented (pp. 17-21); that even if the instant suit be deemed a suit in rem or quasi in rem, there is no conflict with any *existing* suit in rem or quasi in rem in the state court. Petitioner further contends that the instant suit is not in rem or quasi in rem, but is in personam.

(a) Petitioner states (p. 17) that the state courts "never acquired jurisdiction over these surplus funds." Petitioner's suggestion relates only to the jurisdiction of the state court in the liquidation proceedings, petitioner asserting that the possession of the Superintendent of Insurance was not the custody of the court. The point is immaterial in any aspect because the jurisdiction of the state court is sustained by the existing jurisdiction in the pending suit brought by Mr. Lucke (R. 22-34) prior to the instant suit. But the possession of the property by the Superintendent of Insurance as liquidator under the N. Y. statute (former Section 63 of the Insurance Law) was equivalent to custodia legis. Such liquidator is an ancillary receiver, a receiver pendente lite, of the property of a foreign corporation (former N. Y. Ins. Law, sec. 63, subds. 4 and 5, now L. 1932, ch. 191, art. XI, secs. 400-428, in substitution

for former sec. 63 repealed; *Matter of People* [*Russian Reinsurance Co.*], 255 N. Y. 415, 424, 423; *Matter of People* [*City Eq. Fire Ins. Co.*], 238 N. Y. 147, 156).[1] The expression of a district court in *Farrell* v. *Stoddard* (1 F. [2d] 802, 803), cited by petitioner (p. 18) as to a different status of the Superintendent of Insurance under the state statute, was made prior to the contrary view of the N. Y. Court of Appeals (*Matter of People* [*Russian Reinsurance Co.*], 255 N. Y. 415, 424, 423), and is contrary to recent decisions of the Circuit Court of Appeals, 2d Circuit (*Jacoby* v. *Bond & Mortge. Co.*, 72 F. [2d] 420, 423; *Tolfree* v. *N. Y. Title & Mortge. Co.*, 72 F. [2d] 702, 704), in each of which cases it is said:

> "By virtue of the order and article 11[2] of the Insurance Law the Superintendent became in effect a receiver under the supervision of the state court and the property under his control became in custodia legis" (citing cases). "In such circumstances, under established rules of law, the federal courts should not interfere with the possession of the state court" (citing cases).

(b) Petitioner contends that even if the state court acquired custody of the property at the time of the liquidation proceeding, that court did not acquire any *juris-*

---

[1] The statute expressly provided (N. Y. Ins. Law, sec. 63, subd. 5) that "the rights and duties of the said superintendent with reference to such corporation and its said assets shall be those heretofore exercised by and imposed upon ancillary receivers of foreign corporations in this state" and the possession of the Superintendent was to be "for the benefit of its creditors and for such other relief as the nature of the case and the interests of its policyholders, stockholders or the public may require" (subd. 4).

[2] Article XI of the Insurance Law (L. 1932, ch. 191, secs. 400-428) now includes what was formerly sec. 63 of the old statute without material change. See new sections 406 and 408.

diction to adjudicate rights or title to such funds due to the fact that said funds then belonged to a foreign sovereign (the then unrecognized Soviet regime) which at no time had submitted itself or its property to the jurisdiction of the state court. The answer to this suggestion is that the court had the property under its control and could do what is pleased with it (*Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130).

(c) Petitioner contends that even if the state court did acquire jurisdiction and custody in the liquidation procedings, it lost such jurisdiction and control when the funds were handed over to the respondent on April 18, 1933 (R. 6, 7). Even assuming that it did, the state court again obtained jurisdiction over the funds when, on the following day, April 19, 1933, the instant state court suit was begun by Mr. Lucke, the sole surviving director of the Russian corporation and conservator of its property (R. 15, 22). Such state court proceeding was a suit to determine the disposition of the property so deposited with the respondent (R. 32) and was thus a proceeding quasi in rem. As the order in the prior liquidation proceeding had directed that the funds deposited with the respondent were not to be withdrawn except upon the order of a court of competent jurisdiction (R. 55), and as the funds were in safe custody with the respondent, there was no necessity for the appointment of any receiver, which would have been wasteful.

(d) Petitioner contends that even if the state court did obtain jurisdiction on April 19, 1933 through the

pending suit in which Mr. Lucke is plaintiff, on November 16, 1933, the date of recognition and of the "Litvinov" correspondence, the state court lost that jurisdiction because, as is claimed by petitioner, title then vested in the petitioner as assignee of the Soviet government. The answer to the foregoing contention is that nothing which outside parties, sovereigns or anybody else, could do, would oust the state court of its then *jurisdiction* over the property subject to its control.

(e) Petitioner contends that the instant suit is not in rem, but is in personam. As said by the court below, "Nor is there any question here of the personal liability of the defendant (respondent) apart from what may attach solely from the fact that a fund in the custody of the state court, to which plaintiff (petitioner) makes claim, has been placed in its possession under the order of the state court" (R. 188). That the instant suit improperly asks for an account does not make the suit one in personam. This Court has held that where the state court has first acquired jurisdiction over the *res*, a federal district court has no jurisdiction over the *res* or to direct an account (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). All that the district court could do, if the instant suit were one in personam, would be to determine petitioner's claim of title, such determination, if favorable in any respect to the petitioner, to be then presented to the state court for appropriate action thereon (such as marshalling to protect prior equities or liens incurred in the state court proceeding). But the instant suit is not in personam. It is brought for the purpose of asserting a claim to the whole of the funds now in the jurisdiction and control of the

state court and is not brought for the purpose of asserting any personal claim against the respondent other than as the depositary of such funds.

(f) Petitioner asserts that the *only* theory upon which the respondent contends that the pending proceeding in the state court is in rem is that such proceeding is a "continuation of the original liquidation proceeding instituted and carried out by the Superintendent of Insurance." This is not so. The respondent's contention is that when, on April 19, 1933, Mr. Paul Lucke, the surviving director of the Russian corporation and conservator of its property, began the pending suit in the state court for a determination of the disposition of these funds (R. 22-34), the state court then obtained jurisdiction, and that such suit was in its nature one quasi in rem, which jurisdiction may not be ousted or superseded by a subsequent suit in the federal court, likewise in its nature quasi in rem as is the instant suit. It thus becomes unnecessary to discuss whether or not such suit by Mr. Paul Lucke may or may not be regarded, under all the circumstances, as a continuation of the liquidation proceedings as directed by the N. Y. Court of Appeals. In the liquidation proceedings, the Superintendent had paid the claims of the domestic policyholders before the case got before the N. Y. Court of Appeals for final decision and subsequently, pursuant to the direction of the Court of Appeals as carried out by the state court order of August 11, 1931 (R. 50, 52), the Superintendent determined and paid the claims of such foreign creditors as had filed their claims with him prior to the date of the order. To say, as petitioner

does (p. 21) that the Superintendent's authority ended when he had paid the domestic policyholders and creditors, is to show an unfamiliarity with the legal and factual situation.

Petitioner contends that the decision of the court below is in conflict with the decision of another Circuit Court of Appeals in a similar case and that the writ of certiorari should be granted to resolve the alleged conflict. There is no conflict to resolve, and the respective situations are not similar.

Brown v. *Duffin* (13 F. [2d] 708), the case referred to, held that a suit for an accounting where no receiver had been appointed was a suit in personam and not in rem and that "a judgment that defendant first account, and then pay over, is a judgment in personam." It may be admitted that if the instant suit, in form for an accounting, had been the first to be brought, thus making the prayer for an accounting a proper one, it would be a suit in personam, and the prayer for an accounting would be regarded as determinative of the nature of the suit. But this Court has decided that a suit for an accounting in a federal court cannot be maintained if brought subsequent to a suit in rem or quasi in rem in the state court, irrespective of a prayer in the bill for an accounting (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). Therefore, the fact that the prior and pending state court suit is a suit quasi in rem precludes, *as matter of law*, the instituting of a suit for an accounting in the federal court irrespective of the prayer in the bill. The instant suit, in the light most

favorable to the petitioner, may only be considered as a suit for the determination of petitioner's claim of title to the whole of the funds then within the control of the state court. In such aspect the instant suit is one quasi in rem and the rule of priority of jurisdiction is applicable and the instant suit will not lie.

The point is that there is no conflict between the decision below and the *Brown* case. The recent decision of this Court in *Penn General Casualty Co.* v. *Pennsylvania* (294 U. S. 189) clearly states the law.

II

The Effect of the Soviet Decrees

The petitioner's whole argument is based upon the assumption, disputed by the respondent, that the property in question formerly belonged to the Soviet government and now belongs to the United States. The alleged title of the Soviet government is based solely upon Soviet decrees of confiscation allegedly operating upon property outside the territorial jurisdiction of the Soviet government. To sustain such title, this Court would necessarily have to hold that the confiscation decrees of a foreign government may operate upon and transfer title to property actually located in a state of the United States, contrary to the declared public policy of such state and contrary to the decisions of the highest court of such state denying the title of the confiscating foreign state. Respondent repeats what it stated in its original brief herein, that no case has been cited nor can be cited, where any court of this country

has upheld a title based on confiscation except a case—not such as the instant case—where the property confiscated was within the territorial jurisdiction of the confiscating government.

The suggestion of the petitioner, as contained at pages 12 and 13 of the supplement to petition, to the effect that the fund, consisting of state, municipal or federal obligations on deposit in the State of New York, or the proceeds thereof, now represented by deposits in a New York state bank, is not in law to be deemed to be situated within the State of New York but is to be regarded as having its situs in Russia, is directly contrary to the decision of this Court in *Security Savings Bank* v. *California* (263 U. S. 282). In such case, it was held by this Court that the State of California has full dominion over deposits in a California savings bank even though the depositors or their heirs or legal representatives may reside elsewhere. Under the principles of the decision in the *Security Bank* case, the State of New York has full dominion over the funds now in the custody of the respondent Bank of New York and Trust Company, even to the extent of asserting, on its own behalf, a claim by way of escheat. Since the State of New York has dominion over the funds, the State of Russia cannot have such dominion, and having no such dominion it cannot legally claim title by its own confiscation decrees and so set at naught the holdings of the highest court of the State of New York to the effect that the funds must be distributed among the creditors and shareholders of the Company. So also this Court in *Burnet* v. *Brooks* (288 U. S. 378) held that securities actually present in this country have a situs here; that the maxim *mobilia*

sequuntur personam is at most a fiction which must yield to the facts and circumstances of cases which require it; and that "the question who is the owner of the paper depends upon the law of the place where the paper is" (p. 399). The securities here in question and the proceeds of the sale thereof have always had a business situs in the State of New York. They were completely localized in this country (*De Ganay* v. *Lederer* (250 U. S. 376). The cases cited by petitioner in connection with its argument to the effect that the funds have a legal situs in Russia have thus no application.

In the course of its argument, under the heading as above set forth, petitioner makes certain statements and certain arguments which are not supported by the authorities cited or by other authority.

It is stated, at pages 3 and 4 of the supplement to petition, that it was the duty of the Superintendent of Insurance under the laws of New York to transmit the surplus funds remaining after payment of domestic policyholders and creditors, to "the Liquidation Commission appointed by the Soviet decree." On the contrary, the highest court of the State of New York has held that the Superintendent of Insurance should not remit funds to a foreign liquidator where it appears that the foreign liquidator will not deal justly with such funds. Thus in *Martyne* v. *American Union Fire Insurance Co.* (216 N. Y. 183), the title of the statutory liquidator of a dissolved Pennsylvania insurance company was recognized as to New York assets because it was a title in trust for creditors and so in harmony with the New York law. The court expressly stated, however, at page 192, that the title of foreign

statutory assignees is recognized and enforced only "where it can be without injustice." Likewise, in *Matter of People* (*City Equitable Fire Insurance Co.*), 238 N. Y. 147, 157, and *Matter of People* (*Norske Lloyd Ins. Co.*), 242 N. Y. 148, 165, et seq., the New York Court of Appeals points out that under the provisions of the insurance law of the State, funds of a foreign insurance company deposited with the Superintendent of Insurance are held not only for the primary benefit of local creditors, but secondarily for the benefit of all the creditors and stockholders of the Company wherever they may be, and that surplus funds will be turned over to a foreign liquidator only where it appears that such foreign liquidator will deal justly and fairly with such surplus funds.

At pages 4 and 5 of the supplement to petition, in its long quotation from the case of *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, 427, cited to give support to petitioner's argument to the effect that the courts of New York had no further jurisdiction with respect to the surplus assets of the Moscow Fire Insurance Company remaining after payment of local creditors, the petitioner deliberately omits from its quotation the only part of the opinion relating to the question of jurisdiction to deal with the surplus funds. The omitted part of the quotation represented by the stars at page 4, reads as follows:

> "We do not say that the refusal to go farther has its origin in what is strictly a defect of jurisdiction. In this instance at all events there are considerations of convenience and efficiency that may be accepted as decisive irrespective of the scope of power."

The quotation by petitioner at page 12 of the supplement to petition from the case of *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, has no application to the instant case of property actually located in the State of New York. In such quotation the Court of Appeals was speaking of the effect of the Soviet decrees in Russia upon property located in Russia and upon obligations to be performed in Russia.

III

The Scope of the Assignment

Respondent rests upon its original brief and the opinion of the district court.

The petition should be denied.

Respectfully submitted,

FREDERICK B. CAMPBELL,
PAUL C. WHIPP,
LOUNSBURY D. BATES,
Counsel for Respondent.

October 11, 1935.

FILE COPY

No. 195

IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA, *Petitioner*

v.

BANK OF NEW YORK AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, BANK OF NEW YORK AND TRUST COMPANY

FREDERICK B. CAMPBELL
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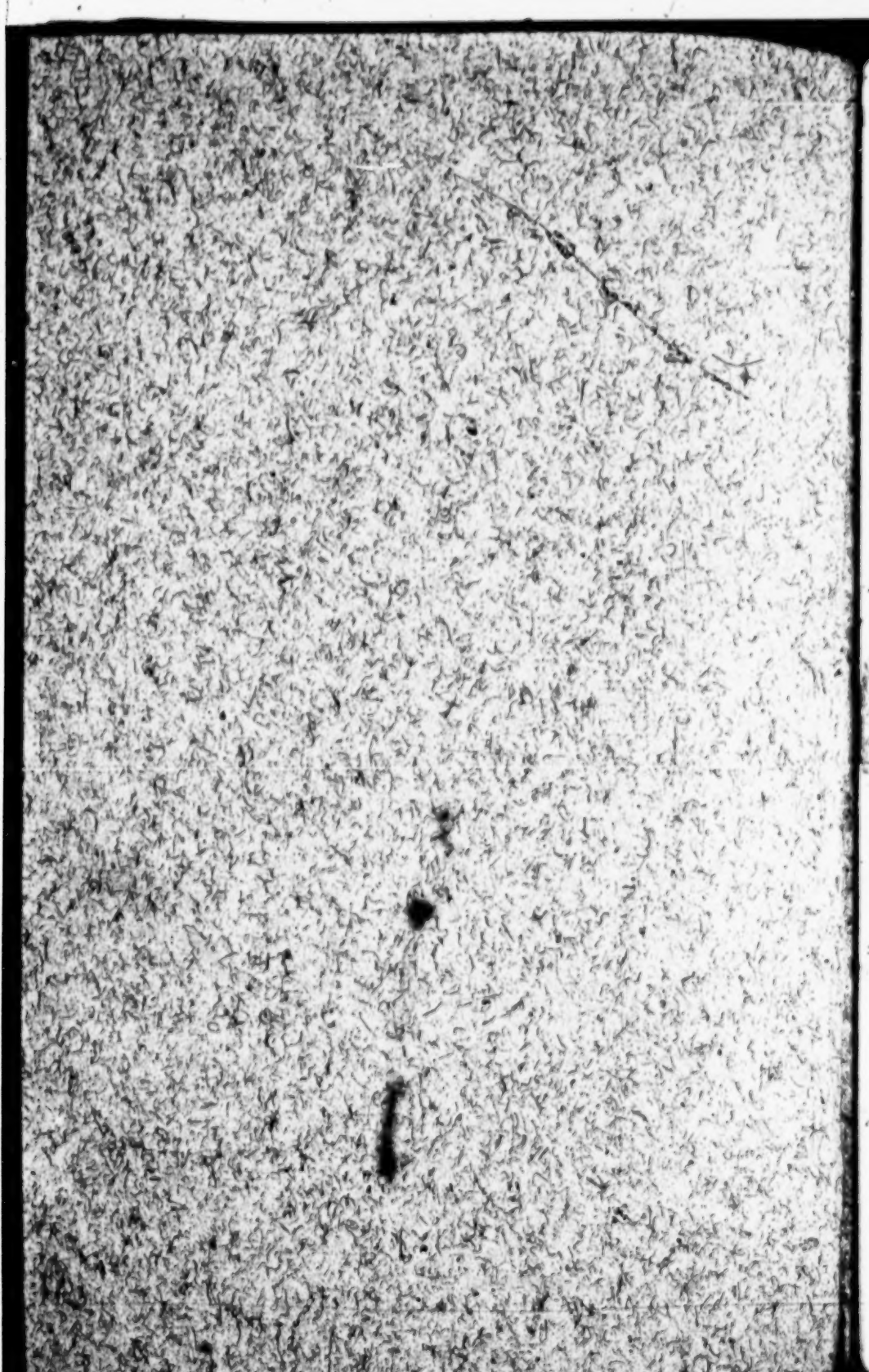

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No. 195

IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA, *Petitioner*

v.

BANK OF NEW YORK AND TRUST COMPANY

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, BANK OF NEW YORK AND TRUST COMPANY.

The opinion of the District Court (R. 80) is reported in 10 F. Supp. 269; the opinions of the Circuit Court of Appeals (R. 89) are reported in 77 F. (2d) 866.

Questions Presented

1. Whether the federal courts will give extraterritorial effect to the Soviet decrees of confiscation over property situated within a State of the United States, and especially where the highest court of the State where such property is located has denied extraterritorial effect to such Soviet decrees as contrary to the public policy of such State.

2. Whether, by the diplomatic proceedings of November 16, 1933, between the President and the representative of the Soviet government, the title to the property here in question has been validly assigned to and accepted by the petitioner, United States.

3. Whether the District Court had jurisdiction of the cause of action asserted in the complaint, the N. Y. state court having assumed jurisdiction and taken constructive possession of the funds in controversy prior to the commencement of the instant suit.

4. Whether the complaint, in any aspect, sets forth a cause of action in equity against the respondent, a mere bailee.

The Decisions Below

The District Court decided in the negative questions 1 and 2, holding that the Soviet decrees of confiscation were against the public policy of the United States and that the assignment and acceptance of November 16, 1933 did not include the property now in question. The Circuit Court, by a majority, decided question 3 in the negative, holding that the federal courts were without jurisdiction by reason of the prior jurisdiction of the state court over the same property sought in the instant suit. Question 4 has not been decided by either of the courts below.

The dissenting opinion in the Circuit Court is based entirely upon the view that the Soviet decrees of confiscation, by virtue of our recognition of the Soviet government, retroactively and extraterritorially vested the Soviet government with title to the assets of United States branches of Russian corporations, although such assets were never within the territorial jurisdiction of such So-

viet government and were located within the territorial jurisdiction of the State of New York. Such views are directly contrary to the previously expressed views of the same judge (*Lehigh Valley R. Co.* v. *State of Russia*, 21 Fed. (2d) 396, 401; certiorari denied, 275 U. S. 571) where, speaking for the entire court, he said: "It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition. Acts theretofore performed outside of its own territory cannot be validated by recognition."

Statement

Petitioner appeals, by certiorari allowed, from a decree of the Circuit Court affirming a decree of the District Court dismissing the complaint. The Circuit Court held that the District Court had no jurisdiction to entertain the bill, and the District Court held that the petitioner's bill failed to state a cause of action (R. 85). The instant suit was commenced on August 22, 1934 by the petitioner as alleged assignee of the alleged title of the Soviet government under certain Soviet decrees of confiscation. The District Court held (a) that the Soviet government had no title or interest except that based upon confiscation, which is a concept so repugnant to our public policy that our courts will not recognize and enforce it over property within our borders, and (b) that the assignment in terms did not cover the fund in question (R. 80).

The respondent is a mere bailee, not a trustee (R. 83; see state court order of August 11, 1931, R. 25-26; *Matter of People—Moscow Fire Ins. Co.*, 255 N. Y. 433, 435). As, owing to apprehension as to the effect of the last sentence in Equity Rule XXXVII, providing that "intervention

shall be in subordination to, and in recognition of, the propriety of the main proceeding," the real parties in interest, with the exception of a single creditor, did not intervene, the respondent is called upon to set forth the general principles relied upon by all of such parties in opposition to the petitioner's claim.

The complaint, alleging that the respondent received the funds in question pursuant to an order of the Supreme Court of New York State (R. 3), the order in question was, by bill of particulars, placed upon the record (R. 23). From this order, it appears that the same was made in the course of liquidation proceedings brought and prosecuted by the N. Y. Superintendent of Insurance in accordance with N. Y. law in N. Y. courts, the funds being within the jurisdiction of the N. Y. court, in the actual possession of the Superintendent of Insurance as liquidator (ancillary receiver or receiver *pendente lite*) in the State of New York of the property of the former Russian corporation, appointed by such state court (former N. Y. Ins. Law, sec. 63, subds. 4 and 5, now L. 1932, ch. 191, art. XI, secs. 406-408, in substitution without material change for former sec. 63 repealed). By this order (of August 11, 1931), the N. Y. Supreme Court, acting in accordance with the decisions of the N. Y. Court of Appeals (see *Matter of People* (*Northern Ins. Co.—Moscow Fire Ins. Co.*), 255 N. Y. 433; see also, in connection therewith, *Matter of People* (*Russian Reinsurance Co.*) 225 N. Y. 415), ordered the funds in controversy to be deposited with the respondent as the agent or depository of the Moscow Company and of Paul Lucke, its surviving director and conservator of its property, upon the filing of a written stipulation of the Moscow Company and of such surviving director and

conservator that the assets or fund would not be withdrawn except upon the order of a court of competent jurisdiction (R. 25-26). Such fund was so deposited with the respondent by the Superintendent of Insurance as such liquidator on April 18, 1933 (Complaint, R. 3).

As shown by petitioner in its affidavit for injunction and by respondent in its opposing affidavits (R. 34, 36-37, 48), on April 19, 1933, the day following the delivery of such funds to the respondent, a suit (R. 11-17) was begun in the N. Y. Supreme Court in the name of the Moscow Company and of Paul Lucke as surviving director of the Company and conservator of its property as plaintiffs and the respondent and some 143 other parties as defendants, such other parties being creditors or shareholders (or their executors, administrators or next of kin) of the Company (R. 14). The object of such suit (hereinafter called the "Lucke suit") was to determine the disposition of such funds (R. 16). Service of process was thereafter obtained, a referee to hear and determine was appointed, a long trial was had before such referee, and such suit had proceeded to judgment which was entered on August 22, 1934, the day upon which the instant suit was brought (R. 37, 49, 53).

During the period of the extensive proceedings in the courts of the State of New York to liquidate the fund and distribute it according to its laws, the highest court of the state repeatedly held, subsequent to recognition as well as before, that these particular confiscatory Soviet decrees upon which petitioner relies were contrary to the public policy of the State of New York, shocking to its sense of justice, and would not be enforced in its courts; and that by such decrees relied upon by petitioner the Soviet government acquired no title to any such assets in

the State of New York of the former Russian corporations (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378-379; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 90, 108-109; *James* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 257).

During such proceedings in the courts of New York to liquidate and distribute the fund, the N. Y. Court of Appeals successively held that the surviving directors of these Russian insurance corporations "retained the power to conserve property in this country as far as the courts of New York can protect it" (1928, *James & Co.* v. *Rossia Insurance Co.*, 247 N. Y. 262, 271); to retain attorneys and counsel (1929, *Matter of Second Russian Insurance Co.*, 250 N. Y. 449); if sufficient to constitute a quorum of the corporation's board of directors, to receive the surplus of the funds after the N. Y. Superintendent of Insurance as liquidator had determined and paid, not only the claims of so-called U. S. creditors (those protected by the statutory insurance trusts) but also the claims of such other creditors as might have been filed with him (Feb. 1931, *Matter of People—Russian Reinsurance Co.*, 255 N. Y. 415); and, where the number of such surviving directors were less than such quorum, to receive the surplus funds as conservators of the corporation's property upon giving a bond conditioned to apply such funds to the use of the corporation, its creditors and shareholders, or, in the alternative, that such funds be deposited, as in the instant case, with a trust company in the city of New York "upon the stipulation of the insurance company and its conservators that the fund will not be withdrawn except upon the order of a court of competent jurisdiction" (Feb. 1931, *Matter of People—Northern Ins. Co.,—Moscow Fire Ins. Co.*, 255 N. Y. 433, 435, R. 25-26).

That the Soviet decrees are confiscatory in their nature is specifically alleged in the complaint (R. 3); is shown by the decrees themselves (R. 29-31); and is so held in all the opinions below (R. 81, 89, 108).

An extended statement of the proceedings in the New York state courts is found in the referee's opinion in the Lucke suit (R. 53-60).

Summary of Respondent's Argument

1. Soviet Confiscation. The funds in question being within the State of New York and the highest court of the State having declared the admittedly confiscatory decrees of the Soviet government to be against its public policy and unenforcible in its courts, the federal district court will follow the holding of the state court. But, irrespective of the foregoing, the Soviet decrees of confiscation are contrary to the public policy of the United States, and the federal courts will not enforce such decrees over property located within the jurisdiction of our courts. Recognition, even if coupled with the alleged acceptance by the President of an assignment of all Russian governmental claims to property in the United States, did not authoritatively determine that the Soviet confiscatory decrees were not against the public policy of the United States.

2. The Litvinoff Assignment. The terms of this ambiguous assignment should not be given a construction having the effect of the President's accepting on behalf of the petitioner United States the office of a collection agent for the Soviet government of alleged claims of any kind, based upon its unique decrees, against property in the United States, with the consequent responsibilities and

liabilities. In the case of diplomatic assignments affecting non-enemy nationals, private property of nationals of the assignor government always will be recognized and protected. No construction of a treaty (let alone a so-called Executive agreement) which would impair that security to private property will be given further than its positive words require.

3. Jurisdiction. When on April 19, 1933 the Lucke suit (R. 11) was begun in the state court, having for its object the determination of the disposition of the property deposited with the respondent (R. 16), the state court acquired constructive control of the property. The nature of such suit was therefore *quasi in rem.* The instant suit is likewise *quasi in rem,* notwithstanding a prayer for an accounting which is improper as matter of law if the prior state court is one *quasi in rem* (*Waterman* v. *Canal-Louisiana Bank,* 215 U. S. 33, 44-46). The instant suit is brought for the purpose of asserting a claim to the whole of the funds now in the jurisdiction and control of the state court in the Lucke suit; there is no question here of personal liability of the respondent apart from the custody of the fund placed in its possession by the state court (R. 92). The rule respecting priority of jurisdiction therefore applies.

4. No Equity Jurisdiction. The complaint fails in any aspect to state a cause of action in equity against respondent, a bailee, not a trustee. The complaint presents a situation where the petitioner asserts an alleged legal title to property in the possession of a bailee for a third person; and is silent as to any allegations showing absence of adequate remedy at law.

ARGUMENT

I

The Soviet decrees of confiscation and appropriation were not effective to transfer title to property having a situs outside of Russia and in the State of New York in the United States.

The question of the power of the Soviet government to terminate the existence of pre-Soviet Russian corporations is not here involved. Nor is there involved the power of the Soviet government to confiscate property actually situated in Russia, whether belonging to Russian corporations or others. The sole question here under discussion is whether the Soviet decrees of confiscation did or can transfer title to Russian corporate property which at and before the time of the promulgation of the Soviet decrees of confiscation was located in the State of New York. If the Soviet government by its decrees of confiscation obtained no title to Russian corporate funds situated in New York, the petitioner, United States, of course obtained no title to such propery by assignment from the Soviet government, however broadly such assignment may be construed. As said by this Court in *United States* v. *Buford* (3 Peters 12, 30), "It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."

A. The Situs of the Property

The petitioner, invoking the doctrine of *mobilia sequuntur personam,* argues that the securities and funds of Russian insurance corporations on deposit in New York had a legal situs in Russia and were therefore construc-

tively under the control of Russia at the time when the existence of the corporations was terminated in Russia by the Soviet decrees. Such argument has no support either in the facts or the law.

It appears from the complaint herein that the property to which petitioner asserts title by alleged assignment from the Soviet government consists of the residue of a deposit with the New York Superintendent of Insurance made by the Moscow Fire Insurance Company, prior to the Russian revolution, in compliance with the laws of the State of New York as a condition precedent to obtaining authority to transact business within the State of New York, and that such residue of deposit, except for a small amount of cash, consists entirely of obligations of the City of New York and of the United States, or the proceeds thereof (R. 3-4). It further appears from the complaint herein that such residue of the deposit was on April 18, 1933, transferred by the Superintendent of Insurance, under order of the New York Supreme Court, to the respondent "as agent or depositary of the said Moscow Fire Insurance Company, said fund not to be withdrawn except upon the order of a court of competent jurisdiction" (R. 3). As a matter of accuracy the funds were transferred to the respondent as agent or depositary not merely of the Moscow Company but also as agent or depositary of Paul Lucke as surviving director and conservator of said company (R. 35-36). It is alleged in the complaint that the Soviet decrees of 1917 and 1918, confiscating the assets of the Moscow Fire Insurance Company, included the right, title and interest of the Moscow Company and its stockholders in and to the deposits which at that time were in the possession of the New York Superintendent of Insurance (R. 3) or the Bankers Trust Company, as trustees (R. 46).

At the time when the Soviet decrees of confiscation were promulgated in 1917 and 1918 and thereafter, the legal title to the deposits which had been made in New York by the Moscow Fire Insurance Company was vested in the Superintendent of Insurance of New York and in the Bankers Trust Company of the City of New York, as trustees (R. 3, 46; New York Insurance Law, sec. 27). Such deposits constituted the local capital of the local branch of the company, treated as a complete and separate organization (*Matter of People, Norske-Lloyd Ins. Co.*, 242 N. Y. 148, 159). The interest of the Moscow Company in such deposits was not a legal but only an equitable interest in and to any balance remaining of such deposits after satisfaction of the claims of domestic creditors (R. 3). The situation then was, as to the New York deposits, that the legal title thereto was vested in an official and in a corporation of the State of New York, the securities themselves were held on deposit in the State of New York, and the obligors upon the securities were the City of New York and the United States of America. To argue on these facts that the situs of the securities or their proceeds was or is in Russia and that Russia had or has dominion over them is stretching legal fictions to an absurdity.

The cases cited by petitioner in alleged support of its argument to the effect that the situs of the securities forming the New York deposits was in Russia, are cases of State succession taxes at the domicile upon the estates of deceased persons. Such cases proceed on the theory that succession taxes are not property taxes but excise or privilege taxes imposed upon the transfer by will or intestacy permitted or enjoyed at the domicile (*Farmers Loan Co. v. Minnesota*, 280 U. S. 204, 214). Such cases

obviously have no application to the dissolution of a corporation and are further inapplicable because no succession at the domicile is enjoyed or even permitted except by confiscation in favor of the Soviet government. Furthermore, the cases relied on by petitioner apply only as between the States of the United States and do not apply to property of aliens in this country (*Burnet v. Brooks*, 288 U. S. 378, 405). To tax the securities themselves or their proceeds, and *a fortiori* to confiscate them, Russia must have had an actual dominion over them, and such dominion never existed. The securities here in question were completely localized in the United States (*DeGanay* v. *Lederer*, 250 U. S. 376, 382). Their actual situs has always been in the State of New York (*Burnet* v. *Brooks*, *supra*, p. 389). The fact that legal title to the securities was vested in New York trustees manifestly fixed their situs in New York to the exclusion of Russia, the domicile of the Company which had only an equitable interest in and to the residue of the securities (*Safe Deposit & Trust Co. of Baltimore* v. *Commonwealth of Virginia*, 280 U. S. 83, 91-93). The maxim *mobilia sequuntur personam* is at most a fiction which must yield to established facts of legal ownership, actual presence and control elsewhere, and to facts and circumstances which in justice require it (*Safe Deposit & Trust Co. of Baltimore* v. *Commonwealth of Virginia*, *supra*, p. 92; *Burnet* v. *Brooks*, *supra*, p. 391).

Likewise, the actual situs of the cash on deposit with the respondent, whether representing cash payments made by the Superintendent of Insurance or the proceeds of the sale of securities, is in the State of New York (*Pennington* v. *Fourth National Bank*, 243 U. S. 269, 271; *Security Savings Bank* v. *California*, 263 U. S. 282). In the cases last cited, it was held by this Court that a State has full

dominion over deposits in a bank of the State even though the depositors or their heirs or legal representatives may reside elsewhere.

B. The Application of the Law and Public Policy of the State of New York with Reference to the Fund

Since the funds in question are completely localized and have their situs in the State of New York, the law and public policy of the State of New York must in the last analysis determine the question of the disposition and ownership of the funds. (*Clark* v. *Williard,* 294 U. S. 211, 214; *Same* v. *Same,* 292 U. S. 112, 123; *City Bank Co.* v. *Schnader,* 293 U. S. 112, 118-119; *Burnet* v. *Brooks,* 288 U. S. 378, 399; *Pennington* v. *Fourth National Bank,* 243 U. S. 269, 271; *Pennoyer* v. *Neff,* 95 U. S. 714, 722). In *Clark* v. *Williard, supra,* this Court in speaking of a foreign statutory successor of a dissolved foreign corporation said (294 U. S. at p. 214), "He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession." In *Burnet* v. *Brooks, supra* (288 U. S. at p. 399) and in *Disconto-Gesellschaft* v. *U. S. Steel Co.,* 267 U. S. 22, 28, this Court said, "But the question who is the owner of the paper depends upon the law of the place where the paper is." In *Pennington* v. *Fourth National Bank, supra,* this Court said (243 U. S. at p. 271), "The Fourteenth Amendment did not in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within

the State." In *Pennoyer* v. *Neff, supra,* this Court said (95 U. S. at p. 722), "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself * * * and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred."

That the State of New York, in the exercise of its proper jurisdiction, has declared in unequivocal terms that it does not recognize the title of the Soviet government under its decrees of confiscation to private property on deposit in the State of New York and that such property must be distributed to or for the use of the creditors and shareholders of the companies which deposited such property, is beyond dispute. In the case of the funds deposited with the New York Superintendent of Insurance by the Moscow Fire Insurance Company, it appears from the petitioner's own bill of particulars of the complaint herein that the New York Court of Appeals has directed that the corporate assets in New York of the Moscow Fire Insurance Company be disposed of as follows:

(a) By the satisfaction of the charges, expenses and taxes of the Superintendent of Insurance.

(b) By the payment of all just claims filed with the Superintendent of Insurance.

(c) By the payment of any just claims by attachment against the funds.

(d) By delivery of the surplus to Paul Lucke as sole surviving director of the company and conservator of its

property upon the filing by him of a surety company bond conditioned upon the faithful application by him of the assets to the use of the Moscow Company, its creditors and shareholders; or, in the alternative, at the election of the Moscow Company, as represented by its said surviving director and conservator, by delivery of such surplus assets to the respondent as agent or custodian under stipulation of the Moscow Company and its said conservator that such funds would not be withdrawn except by order of a court of competent jurisdiction (R. 22-26; *Matter of People—Moscow Fire Insurance Company,* 255 N. Y. 433). In the companion case of *Matter of People—Russian Reinsurance Company and First Russian Insurance Company,* 255 N. Y. 415, the New York Court of Appeals, speaking by CARDOZO, *Ch. J.*, refused to direct the retention of the funds until the recognition of a government in Russia and said at pages 422 and 424: "Holding as we do that the surplus must be made available for the payment of creditors and policyholders with claims founded upon foreign business, there remains the question of the remedy • • • The fund being thus subjected to the remedies of creditors, the question must still be answered how the surplus is to be disposed of after such claims have been allowed. We think the surplus then remaining should be paid to the corporation, represented by directors, a quorum of the board."

While the order of August 11, 1931, entered upon *remittitur* of the Court of Appeals, attached as Exhibit A to complainant's bill of particulars (R. 23), was made prior to recognition of the Soviet government by the United States, the New York Court of Appeals has declared in the most positive terms, both before and after recognition, that it will not enforce or recognize the

Soviet decrees of confiscation as applying to property in the State of New York belonging to Russian corporations. In *James & Co.* v. *Second Russian Insurance Company*, 239 N. Y. 248, decided in 1925, the Court of Appeals, speaking by CARDOZO, *J.*, said at page 257: "As to the Soviet decree, we think its attempted extinguishment of liabilities is *brutum fulmen*, in England as well as here, and this whether the government attempting it has been recognized or not. Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum (citing cases). * * * One government does not execute the tax laws of another (*State of Colorado* v. *Harbeck*, 232 N. Y. 71, 82), nor help another in enforcing a penalty or forfeiture (*Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 102)." In *Matter of Second Russian Insurance Co.*, 250 N. Y. 449, decided in 1929, the Court of Appeals said at page 451: "However the Second Russian Insurance Company, its creditors or stockholders, are entitled to these moneys and they cannot be held in perpetuity by the Superintendent of Insurance." In *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23, decided in 1930, the Court of Appeals, speaking by CARDOZO, *Ch. J.*, said at page 29: "We do not recognize the decrees of Soviet Russia as competent to divest the plaintiff of the title to any assets that would otherwise have the protection of our law." In *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, decided in 1934 after recognition of Soviet Russia by the United States, the Court of Appeals, speaking by HUBBS, *J.*, said at page 378:

> "The deposit was made in New York City, the home of the bank; that is where the contract obli-

gation was created and where it is by its terms to be performed, entirely outside Russian jurisdiction. Laws of foreign governments have extraterritorial jurisdiction only by comity (*Huntington* v. *Attrill*, 146 U. S. 657, 669).

"The principle which determines whether we shall give effect to foreign legislation is that of public policy (citing cases).

"Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail (citation).

"It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts."

Finally, in *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, decided in December 1934 after recognition of Soviet Russia, the Court of Appeals, speaking by CRANE, *J.*, said at page 90: "Recognition does not compel our courts to give effect to foreign laws if they are contrary to our public policy" and speaking by LEHMAN, *J.*, said at page 106:

"Recognition did give the Soviet government, under our law, an international standing which it did not have before. Even so, we have applied the same test after recognition as before, and have refused to give extraterritorial effect to a Soviet decree of confiscation, though recognition had 'validated' its decrees (Vladikavkazsky Ry. Co. *v.* New York Trust Co., supra). In that case, we even

pointed out that the basis of previous decisions was not the lack of recognition, but the fact that confiscatory decrees offended our public policy."

The petitioner attempts to distinguish the above cited cases from the instant case on two grounds, first, on the ground that they involved contracts or deposits made in New York and, second, on the ground that there is no intimation as to what the New York courts would have decided had the Soviet government itself appeared as claimant. As to the ground first stated, it appears equally in the instant case that the deposit was in New York under the statutory contract contained in section 27 of the New York Insurance Law to the effect that the fund should be applied in the first place for the benefit of local creditors and in the second place for the benefit of foreign creditors and shareholders (*Matter of People, City Equitable Fire Insurance Co.*, 238 N. Y. 147, 156; *Murphy* v. *Second Russian Insurance Co.*, 240 N. Y. 554; *Matter of People, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 165; *Matter of People, Second Russian Insurance Co.*, 255 N. Y. 412, 413). As to the second ground, the New York Court of Appeals, contrary to the statement of petitioner, has clearly stated that no claim of the Soviet government under its decrees of confiscation would be recognized.

The above cited decisions of the New York Court of Appeals in the Russian cases are not based on any new theories applicable only to the Russian cases, but are quite in harmony with the general law of the State as previously established in non-Russian cases (*Barth* v. *Backus*, 140 N. Y. 230; *Marshall* v. *Sherman*, 148 N. Y. 9; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99; *State of Colorado* v. *Harbeck*, 232 N. Y. 71).

It is the law and public policy of the State of New

York that upon the dissolution of a corporation its assets are not subject to confiscation or escheat but are to be regarded in equity as the property of the corporate creditors and shareholders and are to be administered and distributed as such (*People* v. *National Trust Co.*, 82 N. Y. 283, 287; *People* v. *O'Brien*, 111 N. Y. 1, 37; *Shayne* v. *Evening Post Publishing Co.*, 168 N. Y. 70, 77; *Lord* v. *Equitable Life Assurance Society*, 194 N. Y. 212, 227-228; *Matter of Long Sault Development Co.*, 212 N. Y. 1, 8). Nor is such law and public policy limited to the protection of the creditors and shareholders of domestic corporations or the domestic creditors of foreign corporations. The rights of all creditors and shareholders are protected insofar as concerns funds on deposit in the State of New York. As said by the Court of Appeals in *Matter of People, City Equitable Fire Insurance Company* (238 N. Y. 147, 156) in speaking of a foreign insurance corporation taken over by the Superintendent of Insurance under the provisions of Section 63 of the Insurance Law:

> "The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this State or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose."

The title of a foreign liquidator of a foreign insurance company to assets within the State of New York will be recognized and enforced only where it appears that such foreign liquidator will deal justly with the funds in the interest of creditors and shareholders (*Matter of People, City Equitable Fire Insurance Company, supra*, pp. 157-158; *Martyne* v. *American Union Fire Insurance Co.*, 216

N. Y. 183, 192). Likewise the statutory title of a foreign assignor is recognized in New York only where not in conflict with the laws or public policy of the State (*In re Waite,* 99 N. Y. 433, cited in *Cole* v. *Cunningham,* 133 U. S. 107, 123). Liquidation of a corporation, as said in the opinion of the District Court (R. 82) implies winding up and distribution of the assets among creditors and shareholders (*Lafayette Trust Co.* v. *Beggs,* 213 N. Y. 280, 283; *Matter of Silkman,* 121 App. Div. 202, aff'd. 190 N. Y. 560). The New York law does not recognize and is under no obligation to recognize the alleged title by confiscation of a foreign government to corporate assets located within the state.

C. The Application of the Law and Public Policy of the United States with Reference to the Fund

The petitioner challenges the application of New York law to the question of the disposition and ownership of the fund and insists that such question is to be settled solely by the law and public policy of the Nation as distinguished from the law and public policy of the state. Under the principles stated by this Court in *Pennoyer* v. *Neff* and *Clark* v. *Williard, supra,* this challenge is without support in law, but assuming the challenge could be maintained, the result would not be different, as the law and public policy of the National government is as strongly opposed to confiscation as the local law and public policy of the State of New York.

It would not be contended by petitioner that the United States may itself confiscate the property in question, contrary to the provisions of the Fifth Amendment to the Constitution. As said by this Court, speaking by Mr. Chief Justice HUGHES, in *Russian Volunteer Fleet* v.

United States, 282 U. S. 481, 491-492: "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for private use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments". Petitioner's contention must necessarily be, therefore, that the confiscatory decrees of the Soviet government are more effective upon property localized in the United States than the laws of our own country even to the extent of over-riding our public policy as declared in the Constitution—a manifest absurdity.

It is elementary that foreign laws have no extra-territorial effect except by comity (*Hilton* v. *Guyot,* 159 U. S. 113, 163-164; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357; *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552, 560) and that comity is not extended to cover the execution or enforcement of revenue, penal or confiscatory decrees of a foreign government (*The Antelope,* 10 Wheat. 66, 123; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 290; *Huntington* v. *Attrill,* 146 U. S. 657, 666-667; *Baglin* v. *Cusenier Co.,* 221 U. S. 580, 596) or the execution or enforcement of foreign laws contrary to our public policy (*Bank of Augusta* v. *Earle,* 13 Pet. 519, 589; *Huntington* v. *Attrill, supra,* p. 676; *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, 160).

In particular, the title of a foreign statutory assignee has no operation outside the jurisdiction where the decree was passed, and is recognized in a foreign jurisdiction only by comity when in harmony with the established

policy of the law of the forum (*Cole* v. *Cunningham*, 133 U. S. 107, 129; *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S. 624, 629).

The confiscatory decrees of the Soviet government are clearly opposed to the public policy of the United States (*Fifth Amendment; Russian Volunteer Fleet* v. *United States*, 282 U. S. 481). Even in time of war, our public policy is opposed to confiscation of private property. As said by Chief Justice MARSHALL in *United States* v. *Percheman*, 7 Pet. 51, 87: "That sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled." As further said by this Court in *Miller* v. *United States*, 11 Wall. 268, 310; "It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies." It is the law and public policy of the United States equally with the law and public policy of the State of New York that upon the dissolution of a corporation its assets are not forfeited but become in equity the property of the corporate creditors and shareholders (*Curran* v. *Arkansas*, 15 How. 304; *Bacon* v. *Robertson*, 18 How. 480 486, *et seq.*; *Lum* v. *Robertson*, 6 Wall. 277, 279; *Shields* v. *Ohio*, 95 U. S. 319, 324; *Farrington* v. *Tennessee*, 95 U. S. 679, 687; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 19; *Kinkead* v. *United States*, 150 U. S. 483, 511). Upon the dissolution of a corporation, the corporate assets belong to the shareholders as tenants in common (*Pewabic Mining Company* v. *Mason*, 145 U. S. 349, 356), and the relations between the shareholders become analogous to the relations of partners (*Mason* v. *Pewabic Mining Company*, 133 U. S. 50, 59). Where the corporate debts have been paid, it has

been held that the stockholders obtain a legal title to the remaining corporate property and may do with it as they see fit (*Stearns Coal & Lumber Co.* v. *Van Winkle*, 221 Fed. Rep. 590, 596). These principles are applied in equity irrespective of statute (*Gardiner* v. *Automatic Arms Co.*, 275 Fed. 697, 700; *Boyd* v. *Hankinson*, 92 Fed. 49, 55; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 19). Granted that the Soviet government had the power to terminate the existence of Russian insurance companies and to confiscate such of their corporate assets as were actually in Russia, title to the corporate assets outside of Russia thereupon became vested in the shareholders as tenants in common, subject to payment of creditors, and the Soviet decrees were as powerless to confiscate such assets as they undoubtedly were powerless to reach other property of individuals in this country, whether such individuals are Russian nationals or nationals of other countries. Alien friends as well as citizens are entitled to the protection of the Fifth Amendment of the Constitution (*Russian Volunteer Fleet* v. *United States, supra*, p. 489, and cases there cited).

If, as petitioner asserts, the Litvinoff assignment purported to assign and the President of the United States purported to accept an alleged foreign confiscator's title to property located in the United States, the assignment to such extent is nugatory as contrary to our public policy against the recognition or enforcement of a confiscator's title. The petitioner denies this by the assertion that the acceptance of the assignment by the Executive constituted in itself an authoritative declaration binding on the courts to the effect that the Soviet decrees of confiscation are not opposed to our public policy. This strange doctrine in the first place begs the question of

the construction of the assignment, discussed elsewhere in this brief. Moreover, a conclusive answer thereto is that the assignment does not mention at all such decrees of confiscation. In the second place it is not the business of the President to declare our public policy in this respect and such doctrine is directly contrary to the decisions of this Court holding that our public policy is to be found in the Constitution, the statutes and the course of administration and decision (*License Tax Cases,* 5 Wall. 462, 469; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 340; *St. Louis Mining Co.* v. *Montana Mining Co.,* 171 U. S. 650, 655). The Executive act represented by the acceptance of the Litvinoff assignment, even if regarded as an act within the treaty power, does not determine public policy contrary to express prohibitions of the Constitution (*Geofroy* v. *Riggs,* 133 U. S. 258, 267); *The Cherokee Tobacco,* 11 Wall. 616, 620-621). The Executive having no authority in peace or war to confiscate property (*Brown* v. *United States,* 8 Cranch. 110; *Miller* v. *United States,* 11 Wall. 268, 310), it follows that the Executive has no power by indirection to override our public policy by an alleged acceptance of title to property in the United States based upon the confiscatory decrees of a foreign government. The application and enforcement of such Soviet Confiscatory decree is no less contrary to the provisions of the Fifth Amendment because instituted by the Executive and not by the Congress (*Home Telephone and Telegraph Company* v. *Los Angeles,* 227 U. S. 278). The question of public policy in such a case as this is for the courts, not the Executive.

D. Fallacies of Petitioner's Arguments as to the Effect of the Soviet Decrees

1. The primary question in this case is not that of the title of shareholders and creditors but that of the title of the Soviet government. The title of the Soviet government is not improved by petitioner's attack on the rights of creditors and shareholders. But meeting such attack, the basic contention of petitioner is that the law of Russia as the law of the State of incorporation is the sole criterion for the determination of the rights or absence of rights of corporate creditors and shareholders of Russian corporations in and to the corporate assets outside of Russia. In support of such contention, petitioner cites certain decisions of this Court holding that the relations between a corporation and its members are regulated by the law of the State of incorporation. Recognition of foreign laws of *regulation* between corporate members, however, is not the same as recognition of foreign laws of *total destruction* of such relations. Moreover, all the cases cited by petitioner in this connection are cases based upon the application of the full faith and credit clause of the Federal Constitution not here applicable, except the case of *Canada Southern Ry.* v. *Gebhard,* which was clearly based upon the harmony existing between the Canadian law relative to a company in financial difficulties and our own laws of foreclosure and bankruptcy. That we do not recognize and enforce extraterritorially a foreign law of the total destruction of the rights of corporate members is shown by the decision of this Court in *Second Russian Insurance Company* v. *Miller, supra,* which held that a Russian ukase forbidding relations between Russian and German nationals valid by German and by New York law, would not be given extraterritorial

effect to the destruction of the contract rights of German nationals. In that case, this Court, distinguishing the *Canada Southern Ry.* case, said at page 560:

> "Nor does Canada Southern Ry. Co. *v.* Gebhardt, 109 U. S. 527, relied upon by appellant, support the contention. That case only laid down the doctrine recently affirmed by this Court (Modern Woodmen of America *v.* Mixer, 267 U. S. 544) that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property. The Russian ukase however did not purport to regulate the internal relations of the corporation to its members or lien holders. By its terms it is applicable indiscriminately to individuals and all classes of associations and corporations, and apparently undertakes to deal with contracts of every kind. It cannot be brought within the purview of the rule established in Canada Southern Railway Co. *v.* Gebhardt and Modern Woodmen of America *v.* Mixer, supra."

If the Canadian law under review in the *Canada Southern Railway* case had attempted to abrogate entirely the rights of bondholders, it cannot be doubted that this Court would have refused to enforce such law in our courts.

The principle that persons may be recognized as having certain capacities in this country which may not be accorded to them at the domicile is well illustrated in the case of *Polydore* v. *Prince*, 19 Fed. Cas. No. 11257 (cited by this Court in *Second Russian Insurance Co.* v. *Miller, supra*), where it was held that a slave domiciled in

Guadaloupe has all the capacities of a free man in a jurisdiction where slavery is not allowed. Even though it should be held in a suit against the Moscow Company or its representative or depositary that as to shareholders domiciled in Russia, and as to creditors whose claims accrued in Russia, the Soviet decrees of confiscation must be recognized, nevertheless such a holding would not improve petitioner's title. Furthermore, it will be noted that the complaint herein makes no distinction between the rights of creditors whose claims accrued in Russia and shareholders who are Soviet nationals and others. Clearly, as to creditors whose claims accrued outside of Russia (*Second Russian Ins. Co.* v. *Miller, supra*) and as to shareholders domiciled outside of Russia (*Disconto Gesellschaft* v. *U. S. Steel Co.*, 267 U. S. 22; *Russian Commercial & Industrial Bank* v. *Comptoir D'Escompte De Mulhouse*, L. R. 1925, A. C. 112, 125), the confiscatory decrees of the Soviet government case have no application as to their rights to assets located outside of the territorial jurisdiction of Russia.

2. The petitioner fails to discriminate between confiscation of property located within the territorial jurisdiction of the confiscating government and alleged confiscation of property located without such territorial jurisdiction. In every case of confiscation cited by petitioner, the property confiscated was property within the territorial jurisdiction of the confiscator and the decisions of this Court upholding title derived from the confiscator laid stress upon the fact that the property was within the territorial dominion of the confiscator. Likewise in the English case of *Luther* v. *Sagor*, relied on by petitioner, the property confiscated was within Russia and title by confiscation was upheld solely on that ground.

3. The argument of petitioner on the question of public policy is fundamentally fallacious. Here the United States is attempting to act as a collection agency for the Soviet government in the application and enforcement in our courts of foreign confiscation decrees as against property in the United States. The United States is the moving party and if it succeeds, it will, by its own action, have taken without compensation the property in this country belonging in part to American citizens and in part to friendly aliens—all contrary to the provisions of the Fifth Amendment. The Executive in purporting to act on behalf of the United States in the enforcement of the Soviet decrees is acting in violation of the Constitution (*Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278). The United States is here attempting to use the Soviet decrees as a sword and not as a shield or defense. While in a proper case, the Soviet decrees may doubtless be invoked as a defense to a cause of action accruing in Russia, far different considerations apply to the use of foreign decrees as the basis of a cause of action (*Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160). A domestic court may always deny affirmative relief based on a foreign statute where such foreign statute is penal or contrary to local public policy (*Bradford Electric Co.* v. *Clapper, supra*, p. 160).

The petitioner's argument that the property in question is that of a sovereign begs the question. That is one of the questions to be decided by this Court. Nor is it material on the question of public policy that the United States is purporting to act as the assignee of a foreign sovereign. Even in the conduct of foreign relations, the Executive may not violate the Constitution (*Geofroy* v. *Riggs, supra; The Cherokee Tobacco, supra; In re Beale,*

2 F. Supp. 899, aff'd 71 Fed. (2d) 737). That the United States as a party litigant in commercial matters is bound by the rules governing other litigants has frequently been decided by this Court (*Standard Oil Co.* v. *United States,* 267 U. S. 76; *United States* v. *The Thekla,* 266 U. S. 328; *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 126; *Cooke* v. *United States,* 91 U. S. 389, 398). The equities of the United States are no greater than those of a private litigant in like circumstances (*Folk* v. *United States,* 233 Fed. 177, 192; *United States* v. *Midway Northern Oil Co.,* 232 Fed. 619, 631; *Sweet* v. *United States,* 228 Fed. 421, 428; *Chase* v. *United States,* 222 Fed. 593, 596).

E. Analogy of the English Law

The petitioner relies on certain English cases. Such cases have no application to the instant case. On the contrary, the English law is in harmony with the contentions of the respondent.

The case of *Luther* v. *Sagor* (1921), 3 K. B. 532, involved the title to tangible property seized in Russia by the Soviet government and subsequently imported into England by the purchaser from the Soviet government. Under these circumstances, the English court, after recognition of the Soviet government by England, held, on authority of *Oetjen* v. *Central Leather Co.,* 246 U. S. 297, and *Underhill* v. *Hernandez,* 168 U. S. 250, that the purchaser from the Soviet government obtained a good title. The basis of the decision, as in the decisions of this Court, cited as authority, was that the property confiscated was actually located in Russia and therefore subject to Russian dominion.

The case of *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (1933) A. C. 289, decided only that the defendant Banque Industrielle de Moscou, a Russian bank, was not in existence in October, 1930. The court did not purport to construe the Soviet decrees of confiscation or to adjudicate the effect of such decrees upon property in England. Lord Wright, in the course of his opinion, at page 302, expressly stated that "No question is here involved of the extraterritorial effect of legislation, confiscatory or otherwise * * *." He further said, on the same page: "Nor do I think it necessary to express any opinion about the status of assets in England, a matter not in these proceedings, but which no doubt will need full consideration in the future." The consideration in the future as to assets in England, referred to by Lord Wright, was given in the subsequent case of *Russian Bank for Foreign Trade* (1933), Chancery Division 745. In that case, MAUGHAM, *J.*, said, in the course of of his opinion:

> "the decrees, as is admitted by both experts, were of a confiscatory character (p. 763) * * *. If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable (citing authorities). The decrees in question could not according to our laws have the effect of extinguishing the debt if locally situate here, or of transferring it to the Soviet Republic; (p. 767) * * *. Of course, if I am right in thinking that the nationalization decrees have no extra-territorial operation, the R.S.F.S.R. have no claim to any of the property which is involved, and as I have pointed out this seems to be their own view" (p. 770).

In *Sedgwick Collins & Co.* v. *Rossia Insurance Co. of Petrograd* (1926), 1. K. B. D. 1, SARGANT, *L. J.*, said, at page 15:

> "Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalized' the undertaking and assets of the Rossia Insurance Company, that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here; see Dicey, Conflict of Laws, 2nd ed., p. 310, and Lecouturier *v.* Rey (3), an analogous case with reference to the goodwill of a trade mark or trade name in England."

In the *Jupiter* (No. 3) (1927) P. 122, aff'd by the Court of Appeal (1927 P. 250), it was held that the ownership of a steamship belonging to a nationalized Russian company but not within Soviet territory did not pass to the Soviet government under its decrees of confiscation. In the lower court, HILL, *J.*, said, at page 144: "As to the second question—that is, the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. If the Jupiter was not within the territory of the R. S. F. S. R., I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognized in all the cases." On appeal, the judgment rendered by HILL, *J.*, was approved in all respects. LAWRENCE, *L. J.*, said,

page 255: "In my opinion the determining factors in this case are: (1) That the nationalizing decrees of the U.S.S.R. do not operate on property outside the territory of that Republic, whether such property belonged to a Russian citizen or not * * *."

In *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte DeMulhouse* (1925) A. C., 112, 125, Viscount Cave said: "I am unable to understand how such an order could be effective to confiscate or destroy shares held by persons out of the jurisdiction of the Soviet Government."

II

Under well settled principles of law concerning the construction of diplomatic acts of transfer of property, any alleged title to the property here in question has not been assigned to and accepted by petitioner, United States.

This question involves the construction of an exchange of letters between the President and the Soviet representative, Mr. Litvinoff (R. 20-22), and particularly what undertakings the President is to be deemed to have assumed for the United States by such correspondence.

Petitioner contends that by such correspondence the United States became the owner by assignment of a claim or title of the Soviet government, based upon its confiscatory decrees, to property located in a State of the United States. If this be so in the instant case, then such assignment covers any right, title or interest of any former Russian corporation or any Russian national at the dates of such decrees wherever he may now be, in

any property in this country. If this be so, then the United States has become the collection agency of such claims for the Soviet government and is under an obligation to seek out such rights (as it is now doing) and to bring suit at its own expense in each and every one of such cases so discovered, where payment or delivery is refused, with consequent infirmities in titles here if petitioner is sound in its contentions as to the construction of such assignment and as to extraterritorial title by confiscation.

Respondent contends that the proper construction of such diplomatic assignment is that it covers funds or claims due to the former Russian Imperial or the "Kerensky" governments and does not cover any interest in the property now in question; that by a previous assignment, dated August 25, 1933, by a Russian financial attaché (Mr. Serge Ughet) accredited to Washington by the Imperial and "Kerensky" Russian governments, which assignment was specified in petitioner's bill of particulars as one of the instruments of assignment on which petitioner relies (R. 18), the assigned property was specified as "formerly belonging to either the Imperial Russian Government or the Provisional Russian Government" (the so-called "Kerensky" government) (R. 19); that the words "or otherwise" in the "Litvinoff" letter (R. 20) are not sufficient to extend so enormously the scope of such assignment; that in the face of decisions of this Court that, in the case of diplomatic assignments affecting non-enemy nationals, private property of nationals of the assignor government always will be recognized and protected, the President will not be deemed to have accepted and assumed for the United States such burden of collection; that the assignment is at least ambiguous

in the respect now invoked; and that even in the case of solemn treaties "no construction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require" (*Strother* v. *Lucas,* 12 Pet. 410, 438).

A. Question of Construction Is Matter for Judicial Determination

Petitioner contends in effect that the assignment means whatever the Executive department or its law officers say it means and that the courts have no function in any case where the United States is a complainant except to stamp with approval whatever assertion the Executive's representatives may make. As the contention is stated by petitioner, it is that the courts should adopt the interpretation placed upon it by both of the high contracting parties, to ascertain which, if doubt exists, application should be made to the Secretary of State. The mere bringing of this suit is claimed by petitioner to be such alleged interpretation. The law is not to such effect. As said by the District Court, "The suggestion of the Government that the 'Litvinoff' assignment is not open to judicial construction requires little comment, for clearly where private rights are concerned, the mere assertion of the Government that the suit should be commenced does not preclude the courts from determining as a judicial matter the true meaning of the instrument involved." If a solemn treaty, with the opportunity for public examination by the Senate, is open for judicial construction, how much more should be an Executive agreement affecting private rights.

The question of what Mr. Litvinoff actually did assign and what the President is to be deemed to have *accepted* for the United States under the law as declared by this Court, is a judicial question.

B. Principles Concerning the Construction of the Transfer of Property by Diplomatic Action

It is a fundamental principle of our law that, in the case of diplomatic assignments affecting non-enemy nations, private property of nationals of the assignor government always will be recognized and protected (*U. S.* v. *Percheman,* 7 Pet. 51, 87; *Strother* v. *Lucas,* 12 Pet. 410, 438; *Coffee* v. *Groover,* 123 U. S. 1, 9; *Kinkead* v. *U. S.,* 150 U. S. 483).

In *Strother* v. *Lucas, supra,* it was said, "No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require." In *Kinkead* v. *United States, supra,* the court construed the terms of the cession of Alaska by Russia to the United States in 1867. It was conceded by the Government in that case that the cession was not intended to transfer title to the United States of any private property, the only point being whether a building permanently erected by a semi-public Russian corporation, since dissolved, upon Russian government land passed into the ownership of the United States. Even upon this apparently simple point, the court was divided in its view. In his dissenting opinion, Mr. Justice SHIRAS, with whom Mr. Justice FIELD concurred, made the following observation, which is applicable in the present case to the shareholders and creditors of the Moscow Company:

> "Even when corporations are dissolved by writs of *scire facias* or decrees in equity, at the suit of the sovereign, their moneys and property not essential to the exercise of their franchises are not forfeited, but are left to the ownership of the stockholders" (p. 511).

Treaties between nations are to be construed as best to conform to the accepted principles of international law and not in derogation thereof (*Vilas* v. *City of Manila,* 220 U. S. 345). Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals (*Sullivan* v. *Kidd,* 254 U. S. 433, 439), and it is expected that their provisions will be expressed in unmistakable terms (*Rocca* v. *Thompson,* 223 U. S. 317, 332).

A treaty cannot change the Constitution or be held valid if violating the Constitution (*The Cherokee Tobacco,* 11 Wall. 616, 620-621; *In re Beale,* 2 F. Supp. 899, affirmed 71 F. (2d) 737). In the *Cherokee* case, *supra,* the Court said (620-621), "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government."

C. The "Litvinoff" Assignment

The "Litvinoff" assignment of November 16, 1933 (complainant's bill of particulars (R. 20-22), purports to assign to the petitioner United States, and the President's reply of the same date accepts assignment of, "all such amounts", such "amounts" being previously expressed as follows:

The Soviet government "agrees that, preparatory to a final settlement of the claims and counter-claims between

the" Soviet government and the U. S. "and the claims of their nationals", the Soviet government "will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due" (the Soviet government, R. 20) "as the successor of prior Governments of Russia, or otherwise, from American nationals * * * and will not object to such amounts being assigned and does hereby release and assign such amounts."

If it were not for the words "or otherwise", petitioner would not have the slightest arguable ground, as without these words the assignment clearly relates to amounts admitted to be due or found to be due the Soviet government "as the successor of prior Governments of Russia" from American nationals. Without these words "or otherwise" the assignment would cover exactly what was covered in the "Ughet" assignment shortly before (R. 19). This "Litvinoff" assignment undoubtedly covered amounts due the Soviet government as the successor of prior governments of Russia. This is all that was held in *State of Russia* v. *National City Bank*, 69 F. (2d) 44. These words "or otherwise" are merely the usual general precautionary words covering, in this case, any possible derivative governmental interests of the Soviet government in and to property in this country not included in the property held by the recognized Imperial and Kerensky governments of Russia; such, for instance, as property held in the United States by the *de facto* but unrecognized Siberian government of Admiral Kolchak (*cf. Nankivel* v. *Omsk All Russian Government*, 237 N. Y. 150) or by the *de facto* but unrecognized South Russian regime of General Denikin (*cf. Voevodine* v. *Government Etc. South of Russia*, 232 App. Div. 204). It is neither necessary nor proper to extend the meaning of these

words "or otherwise" to include alleged claims based upon alleged extraterritorial application of the Soviet decrees of confiscation.

Furthermore, the respondent never was a debtor to the Soviet government or to prior governments of Russia. Respondent's obligation runs to Paul Lucke as conservator of the property of the former Russian corporation, by direction of the N. Y. State Court of Appeals and the order of the state court thereon (*Matter of People—Moscow Fire Ins. Co.* 255 N. Y. 433, 435), which court had the actual possession of the property, through the Superintendent of Insurance as the statutory liquidator or receiver *pendente lite*, and could do as it pleased with it. The state court order first directed that the property now in question be delivered to Mr. Lucke as conservator of the former Russian corporation's property, upon his giving a bond, to apply such property to the use of the corporation, its creditors and shareholders (R. 25). As an alternative to this the order directed the existing situation (R. 26).

Is the enormously broad scope of the assignment claimed by petitioner, to be predicated upon these words "or otherwise" and, especially in view of the law as laid down by this Court, is the President by his acceptance to be deemed to have imposed the consequent responsibilities upon the United States as such collection agency?

Petitioner argues that the agreement of the Soviet government not to sue in our courts (R. 20) requires the construction that all claims of whatever nature were assigned to the assignee, the United States. This argument simply begs the question. The question is as to what is to be deemed to have been *accepted* by the President, presumably acting in view of the law as laid down by this Court.

Petitioner challenges the holding of the District Court that these funds are not to be deemed as due to the Soviet government from American nationals (R. 83). These funds were assets of the Russian corporation which, by decision of the highest court of New York, belonged, as the case might be, either to such corporation if it existed or if not, then had passed to the successor of such corporation—to Paul Lucke as the conservator of the corporation's property in trust for its creditors and shareholders (*Matter of People—Northern Ins. Co.—Moscow Fire Ins. Co.*, 255 N. Y. 433, 435, R. 25) which assets the court, in lieu of a bond, placed in the custody of the respondent as the agent or depositary of such corporation if it existed or if not, then of said Paul Lucke as such conservator (R. 26). Respondent is merely a bailee, without title, and the funds are not due "from American nationals" within the sense of the assignment and its acceptance.

It is further contended by the petitioner that the institution of these suits by the petitioner, a fact which petitioner's brief asserts is well known to the assignor, indicates the intent of the parties to the assignment and is equivalent to a construction of the assignment by the acts of the parties. In other words petitioner contends that this Executive agreement means whatever the Executive department says it means. In such a view the courts have no function whatsoever in any case where the United States is a party, even as assignee, except to stamp with their approval whatever assertion counsel may make on behalf of the Executive. The statement of the proposition is its own refutation. As said in the opinion of the District Court (R. 83-84):

> "The suggestion of the Government that the Litvinoff assignment is not open to judicial con-

> struction requires little comment, for clearly where private rights are concerned, the mere assertion of the Government that suit should be commenced does not preclude the courts from determining as a judicial matter the true meaning of the instrument involved. There is nothing in State of Russia *v.* National City Bank, 69 F. (2d) 44, holding to the contrary; and the statement on page 48 of the opinion that 'Our courts must accept the assertion of the government of the United States as to the effect of an assignment,' mean nothing more than that the authority of Mr. Litvinoff to make the assignment, and the right of the United States to accept it, will not be questioned by our courts. The word 'effect' as used in this excerpt from the opinion, was not intended to preclude judicial interpretation of the language of the instrument itself." (Italics ours.)

The case of *State of Russia* v. *National City Bank, supra*, was a case of a "government account" (p. 46), of money due to a pre-Soviet government of Russia.

Finally, it would seem that the Soviet government in the concluding part of the instrument of November 16, 1933 (R. 20) expressly relinquished any claim with respect to judgments rendered or that may be rendered by American courts in so far as they relate to property or rights or interests therein which the Soviet government or its nationals may have had or may claim to have had an interest. This relinquishment is general and not merely in favor of the United States. The relinquishment in favor of the United States is separate and is found in the first paragraph of the instrument—in the assignment clause itself—wherein the Soviet government agreed not to take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to

be due or that may be found to be due—such amounts being assigned to the United States. Prior to the date when the instrument of November 16, 1933 was executed, the New York Court of Appeals by a final non-appealable decision had decided that the funds in New York of Russian insurance corporations should be distributed to and among the corporate creditors and shareholders. All the proceedings in the state courts thereafter were merely for the purpose of carrying out the decision of the Court of Appeals. Even the dissenting judge in the Circuit Court of Appeals held that upon matters which were *res adjudicata* on November 16, 1933, recognition of Soviet Russia could have no disturbing effect (R. 108).

D. The "Ughet" Assignment

This "Ughet" assignment, although specified in the petitioner's bill of particulars (R. 18-20) as one of the instruments of assignment upon which petitioner relies, was not referred to by petitioner upon either argument below, nor in its present brief.

Mr. Serge Ughet was the financial attaché of the Russian Embassay of which Mr. Boris Bakhmeteff was the Ambassador, accredited to the United States on July 5, 1917, by the Russian Provisional (Kerensky) government (see letter from Secretary of State dated September 24, 1934 and accompanying authenticated copy of letter of Secretary of State, Charles E. Hughes, dated April 29, 1922 (R. 75-76), of which facts as therein stated the court takes judicial notice; see also *State of Russia* v. *National City Bank of New York,* 69 F. (2d) 44; *Lehigh Valley R. Co.* v. *State of Russia,* 21 F. (2d) 396, 400).

This "Ughet" instrument of assignment dated August

25, 1933 (R. 18-20), after purporting to assign certain specified claims, not material here, contains the following provision (R. 19):

> "The foregoing list of claims is not intended to be exclusive. It is the intention of this assignment to transfer to the United States of America all property, rights and claims having a situs in the United States formerly belonging to either the *Imperial Russian Government or the Provisional Russian Government*" (italics ours).

The title which the complaint alleges (par. 4, R. 3) the "Russian State" had, was acquired by confiscation and appropriation "in the latter part of 1917 and the early part of 1918 or thereabouts". Petitioner's second bill of particulars shows that this refers to the decrees of December 1918 and thereafter (R. 23, 26-33) of the Soviet government which succeeded the Russian Provisional (Kerensky) government, which had succeeded the Imperial Russian government. The property for which Mr. Ughet was custodian was the governmental property formerly in charge of the Provisional (Kerensky) Russian Government's Ambassador, Mr. Boris Bakhmeteff. This is shown by Secretary of State Hughes' letter to Ambassador Bakhmeteff of April 29, 1922, where it is said: "After this date the custody of the property of the Russian Government in this country for which you have been responsible will be considered to vest in Mr. Serge Ughet, the financial attaché of the Embassy" (R. 76).

This "Ughet" assignment does not transfer and could not transfer the funds here in question.

III

The District Court did not have jurisdiction of the instant suit.

The chronology of the several extrinsic jurisdictional facts are as follows:

1925. N. Y. state court: Liquidation proceedings brought by the N. Y. Superintendent of Insurance and appointment of Superintendent as liquidator of property of Moscow Company in the State of New York, namely, ancillary receiver (receiver *pendente lite*) under section 63 of the N. Y. Insurance Law (subds. 4 and 5).

1931. N. Y. state Court of Appeals rendered decisions determining disposition of surplus funds so held by Superintendent as ancillary receiver (*Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415; *Matter of People* (*Northern Ins. Co.—Moscow Fire Ins. Co.*), 255 N. Y. 433, 435).

April 18, 1933. N. Y. Superintendent of Insurance delivered funds to respondent (R. 7).

April 19, 1933. N. Y. state court: Suit commenced by Paul Lucke as surviving director of the Moscow Company and conservator of its property by designation of the N. Y. Court of Appeals, in his own name as well as the name of the Moscow Company against the respondent and 143 others (creditors, shareholders, or their next of kin), to determine the disposition of the funds (R. 11).

November 16, 1933. Recognition and alleged assignment by "Litvinoff" correspondence (R. 20).

August 22, 1934. N. Y. state court: Entry of judgment in suit brought by Paul Lucke (R. 45).

August 22, 1934. U. S. district court: Filing of instant suit, being a claim to the entire property so received by the respondent (R. 2).

A. The Prior N. Y. State Court Proceedings are *in Rem*.

On April 19, 1933, prior to recognition, there was begun in the Supreme Court of New York a suit to determine the disposition of the property deposited with the respondent the day before (R. 11, 16). One of the two plaintiffs was Paul Lucke, the sole surviving director of the former Russian corporation and conservator of its property (R. 7, 11; *Matter of People (Northern Ins. Co.—Moscow Fire Ins. Co.)*, 255 N. Y. 433, 435). "Directors less than a quorum may be treated as conservators of the property of their companies when there are assets within the State that might otherwise be lost" (*Matter of People, supra,* 435). To the name of such plaintiff Lucke, as such conservator, was added the name of the Moscow Company. The defendants were the respondent and 143 other parties, such other parties being creditors or shareholders (or their executors, administrators or next of kin) of the Moscow Company.

By such suit the state court obtained jurisdiction and constructive control of the property. The nature of such suit was *in rem* or *quasi in rem*. As the order in the liquidation proceeding had directed that the funds deposited with the respondent were not to be withdrawn except upon the order of a court of competent jurisdiction (R. 26, *Matter of People (Northern Ins. Co.—Moscow Fire Ins. Co.)*, 255 N. Y. 433, 435) and as the funds were in safe custody with the respondent, there was no necessity for

the appointment of any receiver, which would have been wasteful.

Petitioner's Contentions and Their Refutation

(a) Petitioner's brief (p. 78) asserts that the ground —and inferentially the only ground—upon which respondent claims that the proceedings in the state are *in rem,* is that such proceedings are supplemental to, and a continuation of, the liquidation proceedings instituted by the Superintendent of Insurance. Respondent does not so claim. The respondent's contention is that when, on April 19, 1933, Paul Lucke, the surviving director of the Russian corporation and conservator of its property, began the pending suit in the state court for a determination of the disposition of these funds (R. 11-17), the state court then obtained jurisdiction, and that such suit was in its nature one *quasi in rem,* which jurisdiction may not be ousted or superseded by a subsequent suit in the federal court, likewise in its nature *quasi in rem* as is the instant suit. It thus becomes unnecessary to discuss whether or not such suit by Paul Lucke may or may not be regarded, under all the circumstances, as a continuation of the liquidation proceedings as directed by the N. Y. Court of Appeals. In this connection, petitioner's brief contends (p. 78) that the state court's authority in the liquidation proceedings ended when the Superintendent had paid the domestic policyholders. The answer to this suggestion is that the N. Y. Court of Appeals said the Superintendent's authority and jurisdiction did not so end and the court told him to go ahead with the claims of non-U. S. creditors (*Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415, 427, 422-424; cf. *Matter of People—City Equit. Fire Ins. Co.*, 238 N. Y. 147, 156).

The expression of a federal district court in the second circuit in *Farrell* v. *Stoddard* (1 F. [2d] 802, 803), referred to by petitioner, as to a different status of the N. Y. Superintendent of Insurance under the state statute, was made prior to the contrary view of the N. Y. Court of Appeals (*Matter of People* [*Russian Reinsurance Co.*], 255 N. Y. 415, 424, 423); and is contrary to recent decisions of the Circuit Court of Appeals, 2d Circuit (*Jacoby* v. *Bond & Mortgage Co.*, 72 F. (2d) 420, 423; *Tolfree* v. *N. Y. Title & Mortgage Co.*, 72 F. [2d] 702, 704).*

The state court, so appointing the N. Y. Superintendent of Insurance as liquidator or ancillary receiver (receiver *pendente lite*), had full and exclusive power over such property. As said by an able equity judge (WALLACE, *J.*, in *Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130, 133):

> "When it appoints a receiver, the officer becomes its officer, and is completely amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. 'Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve

* In each of these cases it is said: "By virtue of the order and article II of the Insurance Law the Superintendent became in effect a receiver under the supervision of the state court and the property under his control became in custodia legis" (citing cases). "In such circumstances, under established rules of law, the federal courts should not interfere with the possession of the state court" (citing cases). Article XI of the Insurance Law (L. 1932, ch. 191, secs. 400-428) now includes what was formerly sec. 63 of the old statute without material change. See new sections 406 and 408.

> to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state.' Reynolds *v.* Stockton, 140 U. S. 254, 11 Sup. Ct. 773. It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver. U. S. *v.* Coxe, 18 How. 105."

The N. Y. Court of Appeals, in the very cases of these Russian insurance companies, held that, in these liquidation proceedings under section 63 of the Insurance Law, there was jurisdiction to go beyond the determination of the claims of the beneficiaries of the trusts for policyholders and so-called U. S. creditors, and to deal with the surplus, to determine and pay the claims of non-U. S. creditors, namely, those creditors not specifically protected by such insurance trusts. In *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, the court provided for the ascertainment and payment of such "creditors and policyholders with claims founded upon foreign business" (p. 422; pp. 422-424) as had presented or might present in the liquidation proceeding their claims; then directed that the surplus thereafter remaining should be transferred to the surviving directors, constituting a quorum of the board (p. 424). The court then went on to say (p. 427):

> "The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors" (meaning U. S. creditors as particularly protected by the insurance trusts), "it winds up a branch of such business conducted within its borders and in submission to its laws (Matter of People [Norske Lloyd Ins. Co.], 242 N. Y. 248). This done, its

duty ends except to turn the surplus over to a competent custodian (Insurance Law, sec. 63). *We do not say that the refusal to go farther has its origin in what is strictly a defect of jurisdiction.* In this instance, at all events, there are considerations of convenience and efficiency that may be accepted as decisive, irrespective of the scope of power" (citing authorities) (italics ours).

(b) Petitioner's brief (p. 79) further contends that any jurisdiction of the state court over the *res* was lost when the funds were deposited with the respondent as agent or depositary of the Moscow Company and of Paul Lucke, its surviving director and conservator, not to be withdrawn except upon the order of a court of competent jurisdiction (R. 25-26). This may or may not be correct, but in view of the suit begun by Mr. Lucke on the day after such deposit (April 19, 1933, R. 11), it is not necessary to discuss whether such Lucke suit was independent of, or supplementary to, the liquidation proceedings, a suit, say, of the nature of surplus proceedings in a foreclosure suit.

(c) Petitioner's brief (pp. 79-83) contends that, if in ordinary cases the state court, upon the jurisdictional facts here shown, would have priority of jurisdiction, nevertheless the rule of priority of jurisdiction is not applicable herein, because the state courts lacked jurisdiction over the surplus funds in question, since they were formerly the property of a foreign sovereign and on November 16, 1933 became the property of the United States (p. 80). It is further suggested by petitioner that it is not necessary to determine the exact time when the state courts "ceased to have jurisdiction over the funds, because, as was suggested by Judge MANTON in his dissenting opinion, they ceased to have jurisdiction of such funds

on November 16, 1933, the date on which the Soviet government was recognized" (p. 83). The argument admits and asserts that the state courts possessed jurisdiction *only* for the purpose of paying the claims of domestic creditors and policyholders, which claims constituted a *lien* * upon the funds; and that after the Soviet government acquired title, it was beyond the power of any court or state officer, without the consent of the Soviet government, to place additional charges upon or adjudicate claims against such funds (p. 80).

The answer to all this is very simple. We are, in this point, considering the question of *jurisdiction* of the state court over a *res,* not the adjudication which the state court should make. In the liquidation proceedings the status of the Superintendent of Insurance was that of the receiver of the state court; the possession of the Superintendent was the possession of the state court. The *res* being thus in the possession of the state court, the state court had jurisdiction to do as it pleased with it (*Sands* v. *E. S. Greeley & Co.,* 88 Fed. 130), and the highest court of the state thereupon laid down the law applicable to such *res,* such adjudication directing to whom the property should go and to whom it should not go (the Soviet government) (*Matter of People, Northern Ins. Co.—Moscow Fire Ins. Co., supra; Matter of People, Russian Reinsurance Co., supra*). By the institution of the "Lucke" suit (R. 11) the state court obtained jurisdiction in *rem* over the same *res* so affected with the law as previously declared. Neither the "Litvinoff" correspondence of November 16, 1933, the date of recognition and on which the petitioner's alleged title is claimed to have arisen, nor the state court's

* Policyholders and creditors had no lien; they were beneficiaries of the statutory insurance trusts.

knowledge prior thereto of the Soviet regime and its confiscatory decrees which the court declined to recognize, could affect the state court's then *jurisdiction* of the *res* over which it had exclusive control. The situation is not that of suing a sovereign government without its consent, whether such sovereign government be *de jure* or *de facto*. The question of what principles of the public policy of the State of New York or of alleged principles of international law it should adopt was a matter for the discretion of the state court. A court always has jurisdiction even to err.

(d) Petitioner's brief contends that the state courts lacked jurisdiction to entertain suits involving the disposition of the surplus funds because at the time the state court suits (the liquidation proceedings and the Lucke suit) were instituted the funds were the property of a sovereign which had not consented to be sued. In support of this contention, petitioner asserts that the state courts possessed jurisdiction only for the purpose as stated in the New York statute, of paying the claims of domestic creditors and policyholders (that is, of the beneficiaries of the statutory insurance trusts), which claims constituted a lien upon the funds. The law of New York is the other way (*Matter of People—Russian Reinsurance Co.*, 255 N. Y. 415, 424; *cf. Matter of People—City Equit. Fire Ins. Co.*, 238 N. Y. 147, 156). The N. Y. Court of Appeals in the above case directed the ascertainment and payment of such "creditors and policyholders with claims founded upon foreign business" (pp. 422-424) as, in the liquidation proceedings had presented or might present their claims; then directed that the surplus thereafter remaining should be transferred to the surviving directors, constituting a quorum of the board (p. 424). The court then went on to say (p. 427):

> "The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors" (meaning U. S. creditors as particularly protected by the insurance trusts), "it winds up a branch of such business conducted within its borders and in submission to its laws (Matter of People (Norske Lloyd Ins. Co.), 242 N. Y. 148). This done, its duty ends except to turn the surplus over to a competent custodian (Insurance Law, sec. 63). *We do not say that the refusal to go farther has its origin in what is strictly a defect of jurisdiction.* In this instance, at all events, there are considerations of convenience and efficiency that may be accepted as decisive, irrespective of the scope of power" (citing authorities).

So also in *Matter of People—City Equit. Fire Ins. Co., supra,* the Court said:

> "The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this state or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose."

The cases cited by petitioner do not determine that where a foreign sovereign or its property is involved, there is no *jurisdiction* in the court to which is presented a question relating to that sovereign or its property. Jurisdiction, in the sense of power to adjudicate the controversy, is, without question, present. Such courts, having such jurisdiction and power, decline to exercise it in certain cases. Even where such court so abdicates its power to function, it always decides, as a preliminary matter, the essentially judicial question of whether or not there is the

attribute of sovereignty attaching to the property (*The Jupiter* [No. 3], 1927, P. 122, 137-140). All of the cases cited by the petitioner are either cases where the ship libelled was admittedly the property of a foreign sovereign or were cases directly against a foreign sovereign, or against the property of that foreign sovereign, no one questioning the title.

B. The Nature of the Instant Suit is *Quasi in Rem*, Not *in Personam*

That the prayer in the complaint in the instant suit is for an accounting does not make the suit one *in personam* for the reason that where a state court has first acquired jurisdiction *in rem*, a federal district court has no jurisdiction over the *res* or to direct an account (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). Therefore, as matter of law, the instant complaint may not be considered as a bill for an accounting.

The instant suit is brought for the purpose of asserting petitioner's title as "the sole and exclusive owner" (R. 4) to the *whole* of the funds now in the jurisdiction and control of the state court and not for the purpose of asserting any personal claim against the respondent other than as the depositary of such funds. As said by the court below (R. 92) "Nor is there any question here of the personal liability of the defendant (respondent) apart from what may attach solely from the fact that a fund in the custody of the state court, to which petitioner makes claim, has been placed in its custody under order of the state court." In such aspect the instant suit is one *quasi in rem*.

The case of *Riehle* v. *Margolies*, 279 U. S. 218, relied upon by the petitioner, has no application for the reason, as hereinbefore pointed out, that the petitioner in the instant case is not seeking to recover and cannot recover a personal judgment against the respondent. Moreover, in the *Riehle* case, the state court suit was commenced prior to the institution of the receivership proceedings in the federal court, and all that this Court decided was that the creditor had a right to prosecute to judgment such suit against the debtor *in personam*.

Petitioner's brief refers to the case of *Allen* v. *United States*, 285 Fed. 678, C. C. A. 1st, 1923. In that case, it was held that under the law of Massachusetts the state bank commissioner, in taking charge of the property of an insolvent bank, does not act in the capacity of a receiver and his possession is not the possession of a state court. In the instant case, the instituting of the "Lucke" suit in the state court for the disposition of the property in question (R. 11) vested that court with jurisdiction and constructive control over the property in question.

Brown v. *Duffin*, 13 F. (2d) 708 (1926, C. C. A. 6th), also referred to by petitioner, held that a suit for an accounting where no receiver had been appointed was a suit *in personam* and not *in rem* and that "a judgment that defendant first account, and then pay over, is a judgment *in personam*". It may be admitted that if the instant suit, in form for an accounting, had been the first to be brought, thus making the prayer for an accounting a proper one, it would be a suit *in personam*, and the prayer for an accounting would be regarded as determinative of the nature of the suit. But this Court has decided that a suit for an accounting in a federal court

cannot be maintained if brought subsequent to a suit *in rem* or *quasi in rem* in the state court, irrespective of a prayer in the bill for an accounting in such subsequent suit (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). Therefore, the fact that the prior and pending state court suit is a suit *quasi in rem* precludes, as matter of law, the instituting of a suit for an accounting in the federal court irrespective of the prayer in the bill in the instant subsequent suit. The recent decision of this Court in *Penn General Casualty Co.* v. *Pennsylvania* (294 U. S. 189) clearly states the law.

C. Section 24 (1) of the Judicial Code Does Not Prevent the Application of the Usual Rule as to Concurrent Jurisdiction

Petitioner contends that Section 24(1) of the Judicial Code, as amended, C. 231, 36 Stat. 1091 (U. S. C. Title 28, Sec. 41(1),) is conclusive and controlling on the question of jurisdiction in the District Court.

The United States courts, other than the Supreme Court, have only such jurisdiction as Congress has granted to them. The above section of the Judicial Code provides that the district courts shall have original jurisdiction as follows:

> "First. Of all suits of a civil nature, at common law or in equity, brought by the United States; or by any officer thereof authorized by law to sue * * *".

But the jurisdiction of the federal courts in cases wherein the United States is a party, is not always an exclusive jurisdiction. This statute did not purport to remove any of the already existing jurisdiction in the courts of the several states. The state court had undoubted jurisdiction to determine the claim of the United

States as actually filed in the state court proceedings but not pressed therein (R. 50, 75; *Cotton* v. *United States,* 11 How. 229, 231; *Claflin* v. *Houseman,* 93 U. S. 130, 136; *Peoples Trust Co.* v. *United States,* 23 Fed. (2d) 381, 383; *Merryweather* v. *United States,* 12 Fed. (2d) 407).

The state court having acquired control of the *res* and having assumed jurisdiction to administer it, the United States, like any other party litigant, is bound by the numerous decisions of this Court to the effect that the jurisdiction of the court first in control will be respected. That the United States as a party litigant in commercial matters is bound by the rules governing other litigants, has frequently been decided by this Court (*Standard Oil Company* v. *United States,* 267 U. S. 76; *United States* v. *The Thekla,* 266 U. S. 328; *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 126; *Cooke* v. *United States,* 91 U. S. 389, 398). Both the District Court (R. 83) and the Circuit Court of Appeals (R. 91) held that the United States was dealing in private causes of action and in no sense acting in its sovereign capacity.

In support of its contention that the District Court had jurisdiction of the instant suit notwithstanding the prior pendency of the state court proceedings, the petitioner cites several district court decisions, none of which, it is submitted, have any application to the situation in the instant case. In the case of *U. S.* v. *McIntosh* (57 Fed. (2d) 573), relied upon by the petitioner, it appears that the United States was acting in its sovereign capacity as the owner and operator of a marine base which it had purchased pursuant to an Act of Congress, and that the State of Virginia, in which the premises were located, had relinquished to the United States all jurisdiction over the premises in question. Likewise, in the case of *United States* v. *Inaba* (291 Fed. 416), relied upon by the peti-

tioner, the United States was also acting in a sovereign capacity as trustee for its Indian wards. In cases involving lands allotted to the Indians, the jurisdiction of the federal courts has always been paramount. In *United States* v. *Babcock* (6 Fed. (2d) 160), the district court, in granting an injunction to the United States to prevent the opening of a ditch across the Lincoln Highway was fortified by a showing that the highway was an important artery in interstate commerce and a mail route, and furthermore it was admitted that the State of Indiana had no power to prevent this injury, so that in no sense was the court interfering with the power of a state or its courts. The case of *United States* v. *Lee* (106 U. S. 196), relied upon by the petitioner, is not concerned in any respect with questions of conflict of jurisdiction between state and federal courts.

IV

The complaint fails in any aspect to state a cause of action in equity.

The complaint alleges:

(a) That by decrees of the Russian State (specified in the bill of particulars as the Soviet government), the Moscow Company was dissolved and the Company's title to its property and the title and interest of all of its stockholders in its property were confiscated and appropriated by the Russian State (Soviet government) (par. 4, R. 3). By such decrees (bill of particulars of Oct. 1, 1934, R. 22), all private insurance companies became subject to "liquidation" (R. 29), such decrees stating that "all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Fed-

erated Soviet Republic" (R. 29); their bank accounts were "transferred to the income of the Treasury" and they were "given the right to repudiate agreements concluded by a former owner of an enterprise before its nationalization" (R. 31). The debts and shares of such companies, "whose enterprises have been nationalized or sequestrated", were annulled (R. 30).

(b) That on or about November 16, 1933, the Russian State (Soviet government) assigned to the petitioner United States all of its right to the Moscow Company's property, and also assigned to the petitioner all the right, title and interest of all Russian nationals in such property, and that the petitioner has been and now is the "sole and exclusive owner entitled to the immediate possession" of the Moscow Company's property (par. 6, R. 4).

(c) That on April 18, 1933, the N. Y. Superintendent of Insurance transferred and delivered the Moscow Company's property now in question, pursuant to an order of the N. Y. Supreme Court (now set forth in the second bill of particulars) to the defendant Trust Company "as agent or depositary of the said Moscow Fire Insurance Company, said fund not to be withdrawn except upon the order of a court of competent jurisdiction" (par. 5, R. 3).

(d) A demand and refusal (par. 7, R. 4).

(e) Allegations which simply enumerate the foregoing allegations, with the conclusion that the respondent Trust Company holds the said property as "fiduciary and trustee for the complainant" (par. 8, R. 4), and that the petitioner has no adequate remedy at law (par. 9, R. 4).

The allegation that the respondent holds the property as "fiduciary and trustee" for the petitioner (R. 4) is a mere conclusion, amounting, in connection with the other

allegations, at most, to an allegation of bailment (*Young v. Mercantile Trust Co.*, 140 Fed. 61, affirmed on appeal, 145 Fed. 39). The complaint, therefore, presents a situation where the petitioner, as alleged assignee, asserts an alleged legal title to property in the possession of respondent. But respondent is not a trustee, the state court order of August 11, 1931 (petitioner's bill of particulars, R. 23) showing that the respondent is a bailee (R. 24, 25).

Furthermore, the complaint is silent as to any allegations of fact showing that petitioner has no adequate remedy at law.

Conclusion

The decree of the court below, affirming the decree of the District Court dismissing the bill of complaint, should be affirmed. In the event that this Court should be of the opinion that the federal court has no jurisdiction of the controversy, this Court should, it is respectfully submitted, nevertheless indicate its views with reference to the merits of the dismissal of the bill of complaint by the District Court, to the end that multiplicity of suits may be avoided and the long litigation with reference to the disposition of Russian corporate funds in the United States, may be terminated.

Respectfully submitted,

FREDERICK B. CAMPBELL,
PAUL C. WHIPP,
LOUNSBURY D. BATES,

Counsel for Respondent Bank of New York and Trust Company.

December, 1935.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 195

UNITED STATES OF AMERICA,
Petitioner,

against

BANK OF NEW YORK AND TRUST COMPANY,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR ASSECURANZ UNION VON 1865, INTERVENOR.

HARTWELL CABELL,
MILTON B. IGNATIUS,
Of Counsel for ASSECURANZ UNION VON 1865.

The Evening Post Job Printing Office, Inc., 80 Lafayette St., New York, N. Y.

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BRIEF FOR ASSECURANZ UNION VON 1865, INTERVENOR.

Statement.

The Assecuranz Union von 1865, hereinafter called "Assecuranz Union" was granted by the District Court leave to intervene in this case as having an interest in the funds here in controversy (R. 111). Its petition, thereafter filed herein, appears in the Record on page 113, *et seq.* The findings of the Referee in the State Court proceedings (the *Lucke* case), insofar as they directly concern the claim of Assecuranz Union will be found in the Record

on page 64. The judgment in the State Court proceedings entered in favor of the intervenor and directing payment thereof appears in the Record at page 41.

Assecuranz Union is a German insurance company. Its claim against the funds of the Moscow Fire Insurance Company, hereinafter called the "Russian Company", is based upon a contract made in Germany in 1916 directly after the promulgation of a Russian ukase, by the terms of which all Russian subjects were forbidden to enter into any agreement or commercial relation whatever with citizens of enemy countries, and which proclaimed that all existing relations by virtue of contracts with enemy firms must be considered as at an end from the date of promulgation. Violation of the decree was punishable by imprisonment and fine. The German contract was executed on behalf of the Russian Company by Heckscher & Gottlieb of Berlin, Germany, who were general agents of the Russian Company and controlled its extensive reinsurance business outside of Russia in the several countries of Europe and other parts of the world.

By the terms and conditions of the contract certain outstanding reinsurance obligations of the Russian Company accrued on the date of the contract or thereafter to accrue, were to be assumed by Assecuranz Union by a series of novations with the direct writing companies involved, the final account between the two companies to be stated after the running off of the business and the payment of all outstanding losses by Assecuranz Union.

The report and findings of the Referee in the State Court proceedings (the Lucke suit), insofar as they directly relate to the claim of Assecuranz Union are as follows:

> "The defendant Assecuranz Union von 1865 is an insurance corporation of Cologne, Germany. Prior

to the promlugation of the Russian decree of November, 1916, which prohibited intercourse between Russian and German nationals, the Moscow Company had become reinsurer under various treaties of reinsurance made between the Moscow Company and German and Austrian companies, among others, the Aachen and Munich Fire Insurance Company, the Berlinische Fire Insurance Company and the Bavaria Insurance Bank Company, Ltd. When this decree of November, 1916 was issued by the Russian Government it became necessary to substitute another company as reinsurer under these various treaties of reinsurance.

"Accordingly, the defendant Assecuranz Union von 1865 was so substituted under an agreement and arrangement which provided that the Assecuranz Uuion von 1865 would be reimbursed by the Moscow Company for the net amount of any loss sustained by the Assecuranz Union because of such substitution.

"The proof establishes that there did result a loss to the said Assecuranz Union von 1865. This loss is represented by the amount paid by the Union on or prior to July 1, 1927, the date of the last entry in the Assecuranz Union accounts with the Moscow Fire Company. The items were represented by different classes of currency as follows:

Reichmarks	495.23
Dutch florins	2,681.25
Swedish Kronen	7,329.27

"Inasmuch as these amounts were carried by the Assecuranz Union in a running account the rate of exchange should be taken as of the time when the account came to an end, rather than, as contended by the claimant, that the rate of exchange should be taken as of each date that the money became due under the contract. In other words, the proper holding should be that the cause of action arose on July 1, 1927, and the rate of exchange should be fixed accordingly at the date of breach, exclusive of interest (*Gross* v. *Mendel*, 171 App. Div. 237; aff'd 225 N. Y.

633; *Hoppe* v. *Russian Asiatic Bank*, 253 N. Y. 37; *Park* v. *Hoppe*, 257 N. Y. 333, 341; 258 N. Y. 365).

"On this basis as of July 1, 1927, the indebtedness represented by these various currencies converted into dollars was the equivalent of $3,155.12 in United States currency" (R. 64).

No attempt will be made to cover in this argument the general propositions involved in the three cases submitted jointly to this Court in the Government's brief which have been argued at length in the briefs submitted on behalf of the respective respondents.

Synopsis of Argument.

I. The rights of Assecuranz Union arising out of the contract made in Germany are unaffected by Soviet laws or decrees.

II. The power of a State to deal with property located within its territory through its judicial process, subject only to constitutional limitations, is absolute and exclusive.

III. The State of New York by its laws and through its courts has assumed control of the property in question here and has directed that it be used, to the amount required, for the discharge of debts of the Russian Company due its foreign creditors.

IV. The United States suing here as an assignee of the Soviet Government is not the real party in interest, but comes into this court as representing the Soviet Government and in its interests, in an effort to enforce extraterritorially the Soviet confiscatory decrees.

ARGUMENT.

I.

The rights of Assecuranz Union arising out of a contract made in Germany are unaffected by Soviet Laws or Degrees.

The judgment and findings of the State Court to the effect that there was a valid contract made in Germany in 1916 between Assecuranz Union and the Russian Company are not open to collateral attack, and effectively silence any question as to the authority of Heckscher & Gottlieb and the validity of the contract under the laws of Germany.

The facts of the case here are closely analogous to the facts before this Court in *Second Russian* v. *Miller,* 268 U. S. 552. There it was claimed that a contract made outside Russia between a German general agent of a Russian insurance company and a New York firm of insurance agents, respecting the Russian Company's business was void because directly within the prohibitions of the Russian ukase issued in October 1916 prohibiting intercourse between Russian subjects and subjects of countries then at war with Germany.

This Court said (p. 559):

> "In view of the legal relationship existing between Meinel and the Mutzenbechers and the legal consequences which flow from it, we find it unnecessary to speculate as to the precise meaning and effect of the Russian ukase. The Circuit Court of Appeals below rejected the contention that it should be given extraterritorial effect so as to make illegal the transactions had in New York between appellant and Meinel with respect to their dealings with the German firm.

> Certainly such an application of foreign law to acts done within the territorial jurisdiction of the forum carries the principle of the adoption of foreign law by comity much beyond its limits as at present defined, the more so as the contract between a Russian and a German which we are asked to hold illegal on the basis of Russian law is shown by expert testimony in the case to be valid according to the German law. * * * Nor does *Canada Southern Railway Co.* v. *Gebhardt,* 109 U. S. 527, relied upon by appellant, support the contention. That case only laid down the doctrine recently affirmed by this court (*Modern Woodmen* v. *Mixer,* 267 U. S. 544) that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property. The Russian ukase however, did not purport to regulate the internal relations of the corporation to its members or lien holders. By its terms it is applicable indiscriminately to individuals and all classes of associations and corporations, and apparently undertakes to deal with contracts of every kind."

It is to be noted that no question of confiscation for a clash with public policy was presented in the *Miller* case. The Russian ukase of October 1916 was recognized as a legitimate use of war power.

Here we have a German general agent of a Russian company undertaking a salvage operation in the interests of his principal to save that principal from the possible disastrous effects of the 1916 Ukase. The confiscatory decrees of the Soviet Government can certainly have no greater effect extraterritorially upon the liabilities incurred by the German agent on behalf of his principal than did the Czar's Ukase of 1916 upon contractual relations between the parties in the *Miller* case.

II.

The power of a state to deal with property located within its territory, through its judicial process, subject only to constitutional limitations, is absolute and exclusive.

In petitioner's brief, page 42 *et seq.*, it is contended that the situs of the securities comprising the larger part of the funds in question here was under the doctrine of *Mobilia sequuntur personam* not in New York but in Russia, and in support of this contention *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, and other authorities are cited. In the brief filed on behalf of the respondent Bank of New York and Trust Company, the inapplicability of the decisions cited to the case at bar has been pointed out and to set out those reasons again in this brief would be mere repetition. It is proper to point out that the New York Insurance Law regulating the establishment of branches within that state, of foreign insurance companies, is drawn with the express purpose, through the medium of statutory deposits and the establishment of trust funds in the hands of trustees who are required to be residents of the state, to create a New York situs for such deposits and funds; to place their control in the state officer having the power of supervision, regulation and liquidation in proper case; and to make them completely subject to the jurisdiction of the courts of the state. In case of statutory deposits with the Superintendent of Insurance, the bonds are required to be registered in his name or are bearer bonds of which he has physical possession. As to the trusts, the legal title is placed in the resident trustee, and in case of liquidation by court order that legal title is transferred by law to the state officer in charge of liquidation.

In *Pennoyer* v. *Neff*, 95 U. S. 714, this court speaking through Mr. Justice Field said (p. 722):

> "The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them, *One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory.*" (Italics ours.)

This principle has been repeatedly announced and enforced by this Court in a long line of authorities, one of the most recent being *Clark* v. *Williard*, which was twice before this court (292 U. S. 112; 294 U. S. 211). The case came here from the Supreme Court of Montana on certiorari. It involved the application of assets located in Montana which had been the property of an Iowa Insurance company (Federal Surety Company). This Company had been taken over for liquidation by the Iowa Insurance Department, the Company itself dissolved, and the Iowa Superintendent was under the laws of that state the statutory successor of the defunct corporation, with legal title to its assets.

The principal question involved on the first appearance of the case in this court (292 U. S. 112), was whether the Montana court had ignored the "full faith and credit clause" of the Federal Constitution, in refusing to recognize Clark as having the legal title to property of the Surety Company located in Montana by virtue of the Iowa law investing him with that title. This court held that the Montana court erred in refusing to recognize the Iowa Liquidator as the statutory successor of the Surety Company, with title to its property wherever situate, and remanded the case for further proceedings. In those

subsequent proceedings the Montana court, while bowing to the decision of this court to the extent of acknowledging Clark as the statutory successor of the defunct corporation, with legal title to its assets although such assets had a situs in the State of Montana, held that the local policy of that state was to permit attachments and executions against insolvent corporations, and that the writs would not be halted though the effect of the levy be waste or unequal distribution.

The case came to this Court again on certiorari (294 U. S. 211), and it was held that that pronouncement of state policy was final and binding as to property located in the State of Montana.

In the course of the opinion it was said (p. 213);

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts (Citing authorities). Montana does not challenge the standing of this foreign liquidator as successor to the dissolved corporation or as owner of its assets. On the contrary his standing and ownership are now explicitly conceded. All that Montana does by the decree under review is to impose upon such ownership the lien of judgments and executions in conformity with local law. * * *. If the corporation were still in being, and still the owner of the assets, its ownership would be subordinate to the process of the local courts. So much would be conceded everywhere. If title had been conveyed to an assignee for the benefit of creditors by a common law assignment or by insolvency proceedings, claimants in Montana might pursue their suits and remedies in derogation of the assignment when the law or policy of the locality ordained that this result should follow. So much again is settled by unimpeachable authority (Citations). The principle of these decisions applies with undiminished force to a statutory successor. In respect of his subjection to the power of the local law his position is no better than that of the dissolved corporation to whose title he has succeeded, or of its voluntary assignee upon a trust for all the creditors.

He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession. Disconto Gesellschaft v. *Unbreit,* 208 U. S. 570; *City Bank Farmers Trust Co.* v. *Schnader,* 293 U. S. 112; *Cooper* v. *Philadelphia Worsted Co.,* 68 N. J. Equity, 622."

For the purposes of this case and under the doctrine of *United States* v. *Buford,* 3 Pet. 12, 30, the United States as the assignee of the Soviet Government stands in no better position than would that Government if it voluntarily submitted itself to the jurisdiction of our courts to gain possession of this property. If one of the sovereign states of the United States fortified by the "full faith and credit" clause of the constitution, is powerless to interfere with the disposition of the property of one of its corporations by a sister state within whose territorial jurisdiction such property is situate, it would seem preposterous to contend that a foreign government, although recognized by the United States as such, would stand in any better position.

III.

The State of New York by its laws and through its courts has assumed control of the property in question here and has directed that it be used to the amount required for the discharge of debts of the Russian Company due to foreign creditors.

The petitioner argues at great length that the final order in the liquidation proceedings in the State Court directing the residue of the property of the Russian Company to be delivered to the Bank of New York "as agent or depositary" of the Russian Company and to Paul Lucke as "surviving director and conservator" terminated the

jurisdiction of the court in the special proceeding instituted in 1925 for the liquidation of the United States Branch of the Russian Company. The argument does not bear analysis.

There being no domiciliary receiver or other liquidating agency at the domicile of the corporation to which the New York Liquidator could account for the residue in his hands, it was urged upon the New York Courts that the fund should be retained in the possession of the Superintendent of Insurance until some government in Russia be recognized by the United States. Another alternative that was suggested was that the funds be declared escheat to the State. Both alternatives were rejected by the New York Court of Appeals. These Russian cases were all argued and decided together, and the policy of the State of New York is to be gathered from the expressions of the Court in all the opinions.

In the *Matter of People-Russian Reinsurance Company and First Russian Insurance Company,* 255 N. Y. 415, the Court, speaking by Cardozo, Chief Judge, clearly outlines the State policy (pp. 422-423):

> "Holding as we do that the surplus must be made available for the payment of creditors and policyholders with claims founded upon foreign business, there remains the question of the remedy. * * * The fund being thus subjected to the remedy of creditors, the question must still be answered how the surplus is to be disposed of after such claims have been allowed. We think the surplus then remaining should be paid to the corporations, represented by directors, a quorum of the board."

It happened that in the case of the Russian Reinsurance Company and First Russian Insurance Company there were surviving a majority of the Board of Directors of each company to whom delivery could be made, and admittedly such a delivery would terminate the State Court's jurisdiction in the special proceeding.

When the Court came to deal with the disposition of the Moscow Fire Insurance Company's funds a different situation confronted it. A single director (Lucke) survived, who had also been General Manager of the Company. While recognizing him as a conservator and in furtherance of the same purpose, that the fund should reach the foreign creditors and stockholders, the Court conceived it its duty for the purpose of insuring the proper disposition of the funds, to attach a condition to their delivery to this sole conservator. The language of the Court of Appeals was (255 N. Y. 435):

> "Directors less than a quorum may be treated as conservators of the property of their companies when there are assets within the state that might otherwise be lost. (Citation.) Even so, a court of equity will exercise a measure of discretion before surrendering possession to claimants whose powers and duties are born of an emergency."

Accordingly, it was adjudged that Lucke as conservator should give a satisfactory bond to insure his carrying out the Court's orders. In the alternative the funds were to be delivered to the Bank of New York as agent and depositary for the Russian Company and its conservator, to be disbursed only upon the order of a court of competent jurisdiction.

Again, had the condition been complied with and the bond furnished, it may be admitted that a delivery in these circumstances would terminate the jurisdiction of the special proceeding, as creditors and stockholders would have the bond to look to in case of misapplication of any part of the funds. The second alternative however was chosen and a different situation arose.

It is clearly settled in equity that the jurisdiction of a Chancery Court continues beyond the entry of the final decree and remains existent for the enforcement of the terms of such final decree. (*Pease* v. *Rathbun-Jones Engineering Co.*, 228 Fed. 273; aff. 243 U. S. 273; *Waterworks*

Co. v. *Kansas City,* 65 Fed. 691.) A special proceeding under the New York practice is in its nature equitable and would in ordinary course be controlled by the recognized principles of equity. We need not however rely upon the cases. The New York Legislature has provided by law that

> "a special proceeding does not abate by any event if the right to the relief sought in such special proceeding survives or continues." (New York Civil Practice Act, §82)

Is it open to argument that in this case an application could have been made in the special proceeding for an injunction or other appropriate remedy if an attempt had been made my Lucke to withdraw any part of the fund deposited in the Bank of New York without a court order authorizing him so to do? It is submitted that there was no termination or interruption of the jurisdiction of the New York Court in the special proceeding instituted therein for the liquidation of the American funds of the Russian Company until the institution of the Lucke suit and the assumption by the New York Courts of jurisdiction in that suit insured the carrying out of the use imposed upon these funds by the final order entered in the special proceedings.

The commencement of Lucke's suit, its control of the funds in the Bank of New York and the effect of the judgment entered in that suit in the New York Supreme Court have been fully treated in the other briefs and any argument here on that point would be repetition.

IV.

The United States suing here as an assignee of the Soviet Government is not the real party in interest, but comes into this court as representing the Soviet Government and in its interests in an effort to enforce extraterritorrially the Soviet confiscatory decree.

The argument in the respondent's brief in support of the judgment in the District Court, where it was held that the assignment which was relied upon as the basis of the cause of action herein sought to be enforced did not include these funds, makes it unnecessary to cover that ground in this brief. Another and striking phase of the assignment deserves serious consideration.

Throughout the petitioner's brief it is assumed as beyond question that here the Government of the United States is asserting its rights to these funds as a *bona fide* assignee for value, by virtue of the so-called assignment to it executed by the duly accredited representative of the recently recognized Government of Soviet Russia, of all Russian property of whatsoever kind that may be found in the United States. It is submitted that the most casual examination of the Litvinoff letter addressed to Mr. Roosevelt (R. 20) negates any such assumption. In the first paragraph of the letter the agreement evidenced thereby with respect to the claims and counterclaims between the Governments of the two countries and their nationals is declared to be "preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America."

No consideration for the assignment is recited in the letter, the clear intention being that the United States is to be permitted to collect and receive the Russian

property and credits described in the letter and located in this country to hold the same for appropriate accounting to be finally had between the two governments. Any doubt as to this intention of the parties is removed by the further provision contained in the letter that the Soviet Government "is to be duly notified in each case of any amount realized by the Government of the United States from such release or assignment."

It is to be noticed that this letter and the President's reply thereto (R. 21) contain no statement or admission of present liability of either party to the other. The final accounting is to determine whether the Soviet Government owes the United States a balance of account or whether the liability is the other way. In the meantime the amounts which may be collected by the United States and which must be reported as the same are collected are credit items to the Soviet Government to be used in such final accounting.

There is nothing in the arrangement open to criticism, so long as the letter is construed to apply, as it clearly states, to "amounts admitted to be due or that may be found to be due" to the Soviet Government as successor of prior Governments of Russia or otherwise from American nationals, including corporations, companies, partnerships or associations, etc.

When however it is sought to stretch the language employed to include property located here of former Russian corporations, the only claim to such property admittedly being the confiscatory decrees of the Soviet Government, the entire transaction takes a very different aspect. By the arrangement agreed upon the United States Government becomes the voluntary agent for enforcement on behalf of the Soviet Government of claims resting entirely upon Soviet decrees which are directly contrary to the public policy of the State of New York and to the Government of the United States as declared by other Courts.

To say the least, the assumption by the United States Government of the role of agent to recover these funds for the benefit of the Soviet Government, in the face of its own repeatedly declared public policy, is surprising.

What shall we say when there is added the realization that the Government of the United States is here seeking to override the actions of our Courts which have been expressly confirmed and ratified by the Soviet Government.

We direct attention to very significant language in Mr. Litvinoff's letter of November 16, 1933, where he states:

> "The Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it * * *."

Also:

> "The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:
>
> * * * * * *
>
> (b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any government of Russia or nationals thereof."

What is the explanation of such unusual language and undertaking? We can do no better in framing the answer to this query than to quote the editorial comment of the American Journal of International Law published in January 1934:

> "* * * One of these special concessions is the release and assignment to the Government of the United States of all amounts due under American court decisions to the Russian Government as the successor of prior governments in Russia,

or otherwise, from American nationals and the undertaking that, pending the final settlement of all other claims, the Russian Government will not make any claim with respect to judgments rendered or to be rendered by American courts relating to property, or rights, or interests in which the Russian Government, or its nationals, have or claim to have an interest, or with respect to acts done or settlements made by or with the Government of the United States or its nationals relating to property, claims or obligations of any government of Russia or nationals thereof. *This last stipulation is apparently intended to obviate legal difficulties which might otherwise arise on account of the retroactivity of recognition which in law relates back to the date of the origin of the recognized government, thus legalizing all intermediate acts of that government.*" (Italics ours.)

The argument of the Government is based upon the generally conceded retroactive effect of recognition, and it is urged that as a consequence this Government is bound to recognize the legal effect of these confiscatory decrees.

Assuming for the sake of argument, that the funds in controversy came within the scope of the so-called "assignment" contained in the Litvinov letter of November 16, 1933, the Government faces the fact that the Soviet Government by the same letter has ratified and legalized the disposition of these funds by the Courts of this Country. In other words, the Soviet Government as to these funds has waived the retroactive effect of the recognition and agrees to abide by the disposition of the funds as determined under our laws. Whether we view our Government as assignee or as a mere collecting agent of the Soviet Government, the rights that have been passed to it can be no greater than the rights of its assignor or principal and are subject to the limitations voluntarily created and acknowledged by the original possessor of those rights.

Conclusion.

We submit that the so-called assignment by the Soviet Government to the Government of the United States, even if it be held to have included by its terms the funds in question here, is powerless to defeat the payment of the intervenor's claim which has been reduced to judgment in the Courts of New York.

Respectfully submitted,

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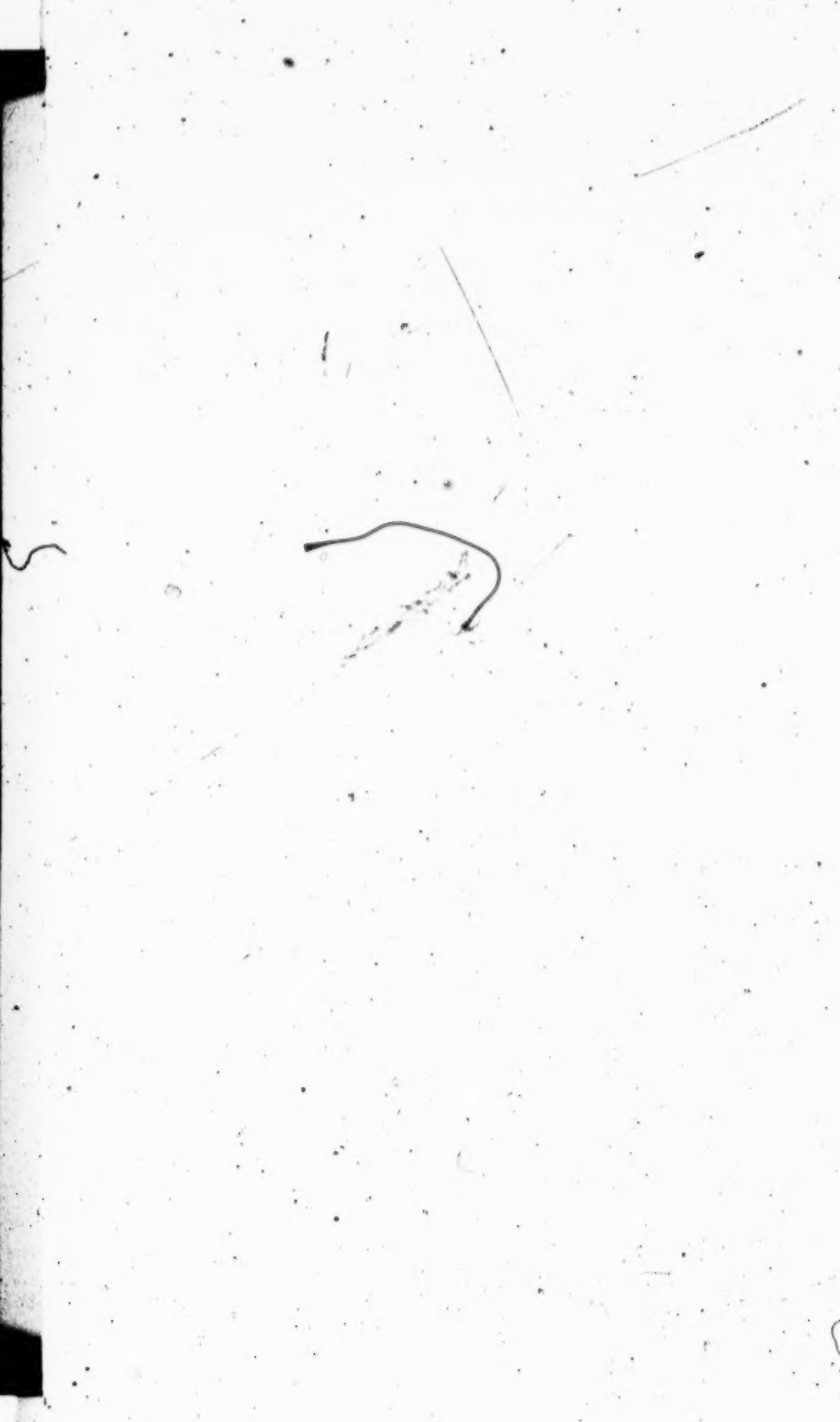
von 1865.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 196

UNITED STATES OF AMERICA

Petitioner

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENT, PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Report of Opinions Below.

Opinion of the District Court (R. 92) is reported in 10 Fed. Supp. 269; the opinions of the Circuit Court of Appeals are reported in 77 Fed. (2d) 866.

Questions Presented.

The court below dealt with the following questions:

1. Whether a decree enacted by the Soviet Government in alleged confiscation of the assets of a Russian corporation without compensation to the owners of such corporation is repugnant to our public policy; whether such decree is entitled to extra-territorial effect; and whether it vests title in the Soviet Government to assets belonging to the Northern Insurance Company of Moscow located in the United States.

2. Whether Litvinoff's letter of November 16, 1933, purporting to assign amounts due by American Nationals, includes the funds of the Northern Insurance Company of Moscow, a Russian National, held in trust for it and its creditors by the respondent.

3. Whether the District Court can oust the New York Supreme Court from the jurisdiction of a fund over which the State Court has had jurisdiction for upwards of ten years.

The Decisions Below.

The District Court held that the Soviet decrees were not enforcible in this country and were shocking to public policy. The District Court also held that, in any event, the assignment did not cover the funds held by the respondent and that it was not an American National which owed any debt to the Soviets, and, therefore, nothing passed to the petitioner under the assignment.

In light of such holding, the court did not deem it necessary to pass upon the jurisdictional question.

The Circuit Court of Appeals, in its prevailing opinion, sustained the decree dismissing the bill of complaint of the petitioner on the ground that the State Court having acquired jurisdiction of the *res*, the Federal Court had no right or power to disturb that jurisdiction, and that the Federal Court did not have exclusive jurisdiction of an action instituted by the United States of the character presented here. The Circuit Court of Appeals deemed it inadvisable as well as unnecessary to pass upon any question in the case other than that of jurisdiction (77 Fed. [2d] 866, 869). The dissenting opinion of Judge MANTON of the Circuit Court of Appeals held a contrary view to the decision of the majority of the Circuit Court of Appeals and also to that of the District Judge.

Statement.

The Northern Insurance Company of Moscow was organized under the laws of the Empire of Russia in the year 1872. It became one of the largest and best known insurance companies in Russia. It established a United States branch, pursuant to the provisions of the New York Insurance Law, in 1911.

The usual statutory deposit exacted from a foreign insurance company, as an incident to the transaction of business here, was made. The company built up a flourishing business in the State of New York. In April, 1925, the Superintendent of Insurance initiated a proceeding in the New York Supreme Court under Section 63 of the New York Insurance Law for an order placing the company in liquidation. An order was entered in that proceeding in June, 1926, which authorized the Superintendent to take possession of the property and assets of the Northern Insurance Company of Moscow for the protection and benefit of its policyholders, creditors, stockholders and the public.

The Superintendent of Insurance entered upon a liquidation of the company. Before the rendition of his final report, the Northern Insurance Company of Moscow commenced a proceeding in the New York Supreme Court for a judgment decreeing the release and return to it of the surplus assets left after the payment of creditors and stockholders who dealt with the United States branch. This relief was resisted by the Superintendent of Insurance of the State of New York upon the ground, among others, that the application was premature and should await recognition of the Soviet Government by the United States. The Superintendent of Insurance also opposed the turning over of the surplus assets upon the ground that the company had been nationalized as a result of the decrees enacted by the Soviet Government and, therefore, had no corporate existence; its directors were without power and they could not maintain the proceeding to recover its surplus assets.

The Court of Appeals in the State of New York overruled the contention of the Superintendent of Insurance in a decision affecting this company and in decisions affecting other Russian insurance companies similarly situated and held that in view of the fact that distribution and liquidation of the assets of the Northern Insurance Company of Moscow, insofar as they were affected by the claims of domestic stockholders and policyholders, had been completed, the Superintendent of Insurance must release the surplus assets of the company so that it might pay those creditors who were not entitled to be classified as creditors of the United States branch. (*Matter of People* v. *Northern Insurance Company of Moscow*, 255 N. Y. 433; *Matter of People* v. *Russian Reinsurance Company*, 255 N. Y. 415.)

In the opinion rendered by the court in the foregoing cases, it was pointed out that the ordinary remedy pursued in the case of an insurance company in liquidation could not obtain. The remedy referred to was the transfer and delivery of the remaining assets by the Superintendent of Insurance whose duties were assumed to be similar to those of an ancillary receiver in equity, to the domiciliary receiver. (*Matter of People—Norske Lloyd Ins. Co.*, 242 N. Y. 148.) Hence the court held that appropriate provision should be made in this country for the payment of foreign creditors.

In the case of the Northern, these creditors consist, to a large extent, of American Nationals who have rendered services to the company in this country and abroad. The group of creditors also comprises French Nationals, English Nationals and German Nationals, all citizens of friendly powers. The Court of Appeals decreed a delivery of the surplus assets to the surviving directors of the Northern Insurance Company of Moscow, conditioned upon the filing of a surety bond. The decision of the court contained an alternative condition permitting the delivery to a trust company in the City of New York in the event of the inability to file the bond so directed by the Court of Appeals. The bond was filed, but before the delivery and transfer of the fund to its directors, it was concluded that the absence of the directors in Europe might delay an early distribution of the funds to the creditors. An application was thereupon made to the Court of Appeals for an amendment of its remittitur so that the funds could be turned over to the Bank of Manhattan Trust Company as agent or depositary. The remittitur was amended and the Court of Appeals directed the transfer of the funds to the Bank. (*Matter of People* v. *Northern Insurance Company of Moscow*, 262 N. Y. 453.)

In the meanwhile, due to the fact that the claims filed with the company by creditors other than domestic creditors were considerably in excess of the assets, an assignment was made for the benefit of creditors. The assignment was made on May 6, 1932, and filed in the New York Supreme Court June 28, 1932. The fund was transferred to the Bank of Manhattan Trust Company and, in turn, pursuant to the order of the New York Supreme Court, transferred by the Bank of Manhattan Trust Company as depositary to itself as assignee.

The assignee thereupon commenced the administration of the trust: advertised for claims, marshalled the assets of its assignor and in June, 1934, prior to the commencement of this action, filed its final account as assignee in the New York Supreme Court. That court entered an order appointing a Referee, Hon. John Godfrey Saxe, to take and state the account of the assignee and to hear objections thereon.

The Referee commenced the duties outlined in the order appointing him and was engaged in passing upon the propriety and validity of claims when this action was instituted. Certain claims of American and European Nationals had been allowed and the reports of the Referee, in connection therewith, had been confirmed. Orders of the New York Supreme Court have been entered directing the amounts to be paid which were found to be due and owing by the Referee, but payment was halted by the commencement of this action. As a result of such decrees the fund is now being held by the respondent subject to the liens of these creditors in whose favor decrees of payment have been made.

The fund which the United States is seeking to recover in this action has always been under the jurisdiction of the New York Supreme Court either in custody of the

Superintendent of Insurance, the defendant Bank as agent or depositary, or in its possession and custody as assignee for the benefit of creditors.

The United States has had notice of the pendency of the assignment proceeding for the benefit of creditors in the New York Supreme Court before the Referee, but has declined to actively participate therein or to note its appearance although invited so to do.

It is submitted that to sustain the Government's contention in this suit would virtually result in the complete reversal of the judgment of the Court of Appeals in a collateral proceeding or action and effectually destroy the remedy made available by that court to the creditors of the Northern Insurance Company of Moscow.

ARGUMENT.

1. The Soviet decree is repugnant to our public policy and has no extra-territorial effect.

The United States claims funds herein by virtue of an assignment from the Soviet Government, but the latter's rights are limited to the extent that the Soviet decrees of confiscation were effective to transfer property located in the State of New York to it. "It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor." (*United States* v. *Buford*, 3 Peters 12, 30.)

The Soviet decrees dissolving the Russian insurance corporations, appropriating their assets and terminating all rights of creditors and stockholders therein, were penal in their nature and contrary to public policy. Every court which has examined these decrees has held them to be

an affront to justice and of no extra-territorial force. (*Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149; *James & Co.* v. *Rossia Insurance Co.*, 247 N. Y. 262; *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23; *Vladikavkazsky Ry. Co.* v. *New York Trust Co.*, 263 N. Y. 369; *The Jupiter*, 96 L. J. P. 62 (1927 Court of Appeals, p. 250); *Employers Liability* v. *Sedgwick*, 1926 1 K. B. L. (Affd. House of Lords, 1927 A. C. 95); *Etat Russe* v. *Ropit*, (1925) 52 Clunet 391 (Trib. Comm. Marseille) (1926) 53 Clunet 667 (Cour d'Appel), 55 Clunet 674 (Cour d'Cassation); *Ginsberg* v. *Deutsche Bank*, (1928) Juristiche Wochenschrift 1232, 1233 (Kammergericht, Berlin); *Council of Russian Orthodox Community in Copenhagen* v. *Legation of R. F. S. F. R.*, (1925-26) Ann. Dig. of Int. L. Cases 24 (Sup. Court of Denmark); *Wilbuschewitz* v. *Zurich*, (1926) 53 Clunet 1110, 1113 (Trib. Fed.) (1925-26) Ann. Dig. of Int. L. Cases 96.)

Our courts have refused to enforce similar decrees where private property has been generally confiscated and private rights annulled. (*Second Russian Insurance Co.* v. *Miller*, 268 U. S. 552; *Baglin* v. *Cusenier*, 221 U. S. 580; *Lehigh Valley R. R. Co.* v. *State of Russia*, 21 Fed. 2d 396; *Oscanyan* v. *W. R. Arms Co.*, 103 U. S. 261; *Cooke* v. *United States*, 91 U. S. 389; *United States* v. *Percheman*, 7 Peters 51.)

The fact that the present Russian Government was not recognized was not the basis of the court's refusal to give effect to these decrees, but, on the contrary, because they were shocking and inequitable. In *James* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 257, it was stated by Mr. Justice Cardozo:

> "As to the Soviet decree, we think its attempted extinguishment of liabilities is brutum fulmen in England as well as here, and this, whether the

government attempting it has been recognized or not."

The Soviet Government, from whom the United States derives its title, on at least two occasions declared that the decrees were inoperative beyond its own territory (R. 85-86; 90-91). In the event that these pronouncements are not controlling, we have the fundamental rule of justice that this country will not enforce the penal laws of a foreign government. (*Huntington* v. *Attrill*, 146 U. S. 657).

The Soviet Government had at no time title to the fund in suit. The assertion of the Soviet title is based upon an alleged confiscatory decree over property which was never within the territorial boundaries of the Soviet Government. On the contrary such property was at all times within the United States and subject to its laws.

The assertion of title by the Soviet Government under the alleged confiscatory decree is contrary to the public policy of this country, for even though our courts might recognize and enforce foreign confiscatory decrees, if they applied solely to persons and property wholly within the jurisdiction of that country, they will not enforce a decree which would deprive our citizens and citizens of friendly countries of their property without due process of law. (In the instant case the United States Government, as alleged assignee of the Soviet Government, is attempting to seize a fund which is subject to decrees directing payment by the courts of the State of New York to certain creditors.)

Diplomatic recognition of the Union of Soviet Socialist Republics by the United States of America does not oust the State courts of their jurisdiction theretofore duly acquired. All of the claims of domestic and foreign creditors based

upon and pending in the State courts' proceedings, arose prior to recognition, so that the rule that recognition is retroactive does not apply to this situation. In the interregnum between the establishment of a foreign government in power and its recognition by this government, its decree is not entitled to any comity. During such period whatever has been done in our courts is not subject to attack and must be regarded as *res adjudicata* and valid as against the world. *Rose* v. *Himely*, 4 Cranch 241; *Gelston* v. *Hoyt*, 3 Wheat. 246.

The cases of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 and *Ricaud* v. *American Metal Company*, 246 U. S. 304, cited by the Government as most favorable to its position on the effect of recognition, do not go beyond the declaration that the courts of one government will not sit in judgment on the validity of acts done by another sovereign within its own territory. In these cases the property, at the time of seizure, was within the boundaries of the confiscating government. The *Ricaud* case held that despite recognition the United States Courts had jurisdiction to adjudicate the validity of the title acquired by virtue of the seizure.

2. The phraseology of Litvinoff's letter excludes any claim against the respondent.

The assignment was never intended to cover the funds in question. Prior to the exchange of correspondence between our Government and Russia, the *res* had been transferred to the Northern Insurance Company of Moscow under the direction of the Court of Appeals. (*Matter of The People* v. *Northern Insurance Company of Moscow*, 255 N. Y. 433, 261 N. Y. 624, 262 N. Y. 453.) This direction, of course, was a recognition that title to these funds was in the Northern Insurance Company of Moscow and

the assets then in the custody of the Insurance Department belonged to it. If any amount was due the Soviet Government because it was the successor of a prior Russian Government, or otherwise, it was due from a Russian National. The Northern Insurance Company of Moscow was a Russian National and not an American National. While the President and Directors of The Manhattan Company is an American National, there is no debt due from that corporation.

The correspondence between President Roosevelt and Mr. Litvinoff encompassed only the situation as is reflected in the case of *The State of Russia* v. *National City Bank*, 69 Fed. 2d 44. If the funds in question were intended to be covered by the agreement, specific mention of them would have been made. This was done in the case of *The Russian Volunteer Fleet.*

Again, if we take subdivision B of the closing paragraph of the letter, we find that the Soviets also agreed not to make any claim with respect to "acts done * * * by * * * public officials relating to property * * * of * * * any Russian National."

In this case we have the fact that there has been a distribution of a substantial amount of money by the Superintendent of Insurance of the State of New York, a public official, and a transfer of the surplus assets by him under an order of the court to the Bank as assignee. It certainly cannot be established that the Russian Government intended to assign to our Government any claim to either the assets distributed by the Superintendent of Insurance or those now in the process of distribution by the Bank under the jurisdiction of the Supreme Court.

The assignment could only transfer to the United States such right, title and interest that the Soviet Government had at the date of the execution of the instrument of as-

signment. At the time the assignment was made the fund in suit was under the jurisdiction of the Supreme Court of the State of New York and subject to the claims of creditors who had filed their claims in that proceeding. The United States Government's title to the fund, if any, was therefore subject to the same disabilities that existed against the title of its assignor. The United States was, as a result, bound by the pendency of the New York State Court action and the proceedings that had taken place therein, and the existence and approval of prior claims filed against the fund in the possession of the State Court.

3. The Federal Court will not interfere with a proceeding properly pending in a State Court.

Section 24 of the Judicial Code as Amended, c231, 36 Stat. 1087, 1091 (U.S.C. Title 28, Section 41) speaks of original jurisdiction only. The words quoted from that statute do not of themselves, and without more, exclude the jurisdiction of the State Court. The State Court is only excluded from jurisdiction where a statute expressly grants such jurisdiction to the courts of the United States exclusively.

Section 256 of the Judicial Code, U. S. C. Section 371, sets forth when the United States Courts shall have exclusive jurisdiction as distinguished from original jurisdiction. There is nothing in that section which expressly grants to the United States Court exclusive jurisdiction over suits where the United States is a party.

When the Sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. In the case of *Merryweather* v. *United States*, 12 Fed. 2d 407, 409, Circuit Judge Hunt said:

> "While the United States Courts have original jurisdiction of suits at common law, or in equity, wherein the United States is plaintiff, such jurisdiction is not exclusive. Interpretations of the Constitution settled that point many years ago. In *Plaquemines Fruit Co.* v. *Henderson*, 170 U. S. 511, it was held that the words 'judicial power' used in Section 1 of Article III of the Constitution do not withdraw from States authority to determine by their courts all cases and controversies to which the judicial power of the United States was extended and which jurisdiction was not given to the National courts exclusively."

The Government's suit is in the nature of an action *in rem*. It must be conceded that the original proceeding brought against the Northern Insurance Company in the State Court, the purpose and effect of which was a seizure and a distribution of the insurance company's assets among its creditors, was a proceeding *in rem*. The Government's claim is also *in rem* for what it seeks is a judgment against the funds of the Northern Insurance Company in control and possession of the Bank. (*Pennoyer* v. *Neff*, 95 U. S. 714, 734; *Peoples Trust* v. *United States*, 23 Fed. 2d 381.)

The State Court having prior jurisdiction cannot be deprived of it. (*Byers* v. *McAuley*, 149 U. S. 608; *Ellis* v. *Davis*, 109 U. S. 485; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Covell* v. *Heyman*, 111 U. S. 176; *Borer* v. *Chapman*, 119 U. S. 587; *Freeman* v. *Howe*, 24 How. 450.

The relief sought by the United States to obtain a stay of the State Court proceeding is expressly prohibited by Section 265 of the Judicial Code:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunc-

tion may be authorized by any law relating to proceedings in bankruptcy."

The provisions contained in this section cannot be violated even by the United States. (*United States* v. *Parkhurst Davis Co.*, 176 U. S. 317.)

Conclusion.

There is neither reason nor authority to sustain the contentions of the Government. The decisions of the courts below are founded on well-established precedents. The record raises no question of merit deserving of review on certiorari.

Respectfully submitted,

LEROY B. ISERMAN,
ROBERT J. SYKES,
WILLIAM C. MORRIS,
Counsel for Respondent.

July 1935.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 196

UNITED STATES OF AMERICA

Petitioner

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

ROBERT J. SYKES
Solicitor for President and Directors of the Manhattan Company, successor to the Bank of Manhattan Trust Company, Respondent

ROBERT J. SYKES
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 196.

UNITED STATES OF AMERICA,

Petitioner,

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY.

Opinions Below.

The opinion of the District Court is reported in 10 Fed. Supp. 269; the opinions of the Circuit Court of Appeals are reported in 77 Fed. (2d) 866, 880, 881.

Questions Presented.

1. Whether a decree enacted by the Soviet Government which purports to confiscate and appropriate, without compensation, assets of a Russian Insurance Corporation, is effective to transfer title to such assets which at the time of such decree, and ever since, have been located in the United States.

2. Whether such a decree which is repugnant and contrary to our public policy and shocking to our sense of justice and equity, will be enforced by our Courts.

3. Whether Russian or American law should be applied, where the situs of the assets or the debts is located here.

4. Whether the Executive Department of the United States Government proclaims the public policy of the country.

5. Whether Litvinoff's letter of November 16, 1933, to the President of the United States, purporting to assign amounts due by American Nationals, includes the funds of the Northern Insurance Company of Moscow, a Russian National.

6. Whether the petitioner's interpretation of Litvinoff's letter of November 16th, to President Roosevelt, must be adopted, and precludes this Court from an examination of the assignment for the purpose of determining its scope and extent.

7. Whether the mere fact that the United States of America is the plaintiff justifies the interference, by the Federal Court, with a proceeding *in rem* properly pending in a State Court, where the State Court had priority of jurisdiction and still has possession of the *res*.

Statement.

The Northern Insurance Company of Moscow was organized under the laws of the Empire of Russia in the year 1872 (R. 10). It was during the ensuing years, up to the overthrow of the Czaristic regime, one of the outstanding insurance companies in Russia. In 1911, it established an United States branch (R. 10). It made the usual statutory deposit required by the Insurance law in this State and thereupon commenced business through its New York office (R. 10). It continued in the transaction of business from the year 1911 until April, 1925 (R. 10). In that year, the Superintendent of Insurance brought a proceeding, pursuant to Sec. 63 of the Insurance Law, to take possession of its assets for the benefit of its policyholders and creditors, on the ground that continued operation and further activity by the Company was hazardous to its policyholders and creditors (R. 10).

In June, 1926, an order was entered in the New York Supreme Court, in this county, in such liquidation proceeding, authorizing the Superintendent of Insurance to take possession of the property and assets of the Northern Insurance Company of Moscow, for the protection and benefit of *its policyholders, creditors, stockholders and the public* (R. 10).

Thereafter, the Superintendent of Insurance proceeded with the liquidation of the Company and continued with such duties until the 16th day of December, 1932, when he filed his fourth and final report as liquidator of the United States branch with the New York Supreme Court (R. 11). The Superintendent of Insurance, during his liquidation of the Northern, paid all of the policyholders and creditors who had transacted business with the United States branch, and after such payment a substantial surplus remained (R. 11).

Under an interpretation of the Insurance Law, the Court of Appeals had ruled that the Superintendent's function was to deal only with those claims arising out of business transacted with the United States branch.

Matter of People (Norske Lloyd Insurance Company), 242 N. Y. 148; 249 N. Y. 139.

With a disclosure of a surplus remaining after the payment of the claims just referred to, the Northern instituted a proceeding in the New York Supreme Court seeking the return to it of its surplus assets (R. 11).

Prior to the application for such relief, a demand had been made upon the Superintendent of Insurance that he turn over the funds to the Company and its directors, but this demand had been refused upon several grounds. The Superintendent of Insurance asserted that the Company was defunct, that its directors had no authority to act on its behalf, and that the fund should be retained by the Superintendent of Insurance until this country had accorded recognition to the Soviet Government. The surplus which was thus applied for by the Northern was the balance of assets which had been deposited with the Superintendent of Insurance, under the statutory provision heretofore referred to, plus accretions which had grown out of the transaction of business here (R. 11). The funds then in the hands of the Superintendent of Insurance, or presently in the possession of the defendant Bank, have at all times been in this State and never within the territorial confines of Russia. When the Northern applied to the New York Supreme Court for the return of its surplus assets, the application met with vigorous opposition from the Superintendent of Insurance (R. 11). This opposition continued in the Appellate Division and the Court of Appeals (R. 11). In February, 1931, the Court of Appeals gave

heed to the plea of the Northern and other Russian insurance companies for a return of their surplus assets. Comprehensive decisions were handed down by that Court touching upon various phases of the Russian situation, and among these decisions was one directly involving and passing upon the right of the Northern to reclaim its assets.

Matter of People (Northern Ins. Co.), 255 N. Y. 433.

The Russian situation, for the first time in the history of the Insurance Law, created what might be termed an anomalous state of facts with respect to the liquidation of an insurance company. Ordinarily in the case of a foreign insurance company placed in liquidation in the State of New York, under what was formerly Section 63 of the Insurance Law and which has now been adapted and carried over into the present Section 400, the Superintendent of Insurance acted as the ancillary receiver of such company in the marshaling of assets in the State and the allowance, disallowance and payment of claims. Up to the presentation of the complexities arising out of the overthrow of the Czaristic Government by the Soviets, every instance which had been submitted to our court of a foreign insurance company in liquidation presented a state of facts in which there was a domiciliary receiver. The procedure under such circumstances presented no unusual difficulties. After the payment of claims of those who were entitled to be paid the Superintendent of Insurance merely remitted the surplus to the domicil of the corporation and into the possession of the domiciliary receiver. In the Russian cases this was impossible of performance. When the various Russian insurance companies petitioned the Courts in the State of New York and the matter was finally decided by the Court of Appeals, there was complete comprehension by the Court of the fact that there could not be any

transmission of funds to a domiciliary receiver because none existed.

Careful examination of the various opinions which were written in the case of each company very clearly discloses that the Court was only considering the rights of which might be termed "foreign creditors". The term "foreign creditors" here is used merely to denote those creditors who had not dealt with the United States branch, although as a matter of fact it included among such so-called foreign creditors here many American citizens and residents of this country. The New York Court of Appeals in its various decisions pointed out that to deny these so-called foreign creditors any relief was in effect to unjustly deprive them of any remedy in that or any other forum. It was observed, of course, that they had no standing in the Russian courts, and even so their standing would be ineffectual because our courts do not permit a release of the surplus assets for transmission to a country whose decrees had not been recognized.

The Court of Appeals ordered the Superintendent of Insurance to turn these funds over to the Company's directors, upon condition that such directors should execute an appropriate surety company bond to the people of the State of New York in an amount equivalent to the value of the assets so delivered. The decision further provided that such delivery was conditioned upon a clause to be inserted in the bond that the directors would faithfully apply the assets to the use of the Corporation, *its creditors and shareholders.* In the event that the bond could not be furnished, then the funds were to be delivered to a trust company in the City of New York as *agent or depositary.* The delivery of such assets to an agent or depositary was further safeguarded by preventing their withdrawal except upon the order of the Court. At the time the matter was

presented to the Court of Appeals, it appeared that the Northern had assets in excess of its liabilities.

After the decision of the court ordering the release of the funds, it was found, however, that the distribution of the assets of the Northern through the directors would be attended with difficulties and would be highly impracticable. This was due to the non-residence of the directors and their absence in Europe. Thereupon, an application was made in the Court of Appeals for the amendment of the remittitur, so as to permit the alternative provision to be availed of. That motion was granted and the funds were directed to be turned over to The Bank of Manhattan Trust Company, the predecessor in interest of the defendant.

Matter of People (Northern Ins. Co. of Moscow), 262 N. Y. 453.

That transfer was again conditioned upon a stipulation that the funds would not be withdrawn except upon the order of a court of competent jurisdiction. At the time the surplus had been ordered turned over to the directors of the Company, a number of claims were filed against the fund, with the result that these claims greatly exceeded the amount of surplus assets on hand.

To avoid inequality among the creditors and to prevent attachment or other proceedings, the Northern made a general assignment for the benefit of creditors to The Bank of Manhattan Trust Company, as assignee. The Bank qualified as assignee (R. 12), and proceeded upon the performance of its trust, pursuant to the provisions of the Debtor and Creditor Law (R. 12).

Thereafter, the Court authorized and directed The Bank of Manhattan Trust Company, as agent or depositary of the Northern, to release, transfer and deliver to itself, as

assignee, all of the funds in its possession (R. 12). Claims were advertised for, assets marshalled and in May, 1934, the defendant filed its final account as assignee in the New York Supreme Court (R. 13).

The Court appointed as Referee, Hon. John Godfrey Saxe to take and state the account of the assignee and to hear objections thereon (R. 13). The Referee was further directed in the order of reference to take proof and report as to the persons entitled to share in the distribution of the Estate and in what priority and proportion (R. 13).

The Referee proceeded to take proof as to some of the claims and was so engaged when this action was launched by the Government. Reports have been filed covering certain claims and the remaining claims before him are now the subject of investigation and examination by him (R. 13).

The Bank now holds in its possession, as assignee, approximately $249,000.00.

SUMMARY OF ARGUMENT.

I.

Each country within its territorial limits maintains its own laws and establishes its own order. These laws are restricted to property and persons within its own jurisdiction.

The State having physical control of property within its borders can legislate with respect to said property and supervise a transfer according to its laws. Such transfer and the principles authorizing it are not rendered ineffectual by the fact that such transfer as carried out is not in accordance with the requirements of law in the

country where the owner is domiciled. In any event whatever has been done in the interim between the establishment of a foreign government and its recognition by the government of the United States is not subject to attack and is valid as against the world.

When a foreign corporation comes into New York State and transacts business there, it must yield obedience to our laws. Our courts will disregard the fiction of the corporation's residence in the state of its origin when a prohibited act done in the domiciliary state violates the sound public policy of the forum.

Creditors in this country may pursue their remedies against property in this forum in derogation of the claim of an alleged universal successor who derives his title from a transfer made in the country of the corporation's domicile, where said creditors are proceeding in accordance with the policy of administration fixed by the law of the forum. While the lex domicilii might destroy the remedy of creditors in the Russian Empire it could not destroy their right to proceed against a fund in another jurisdiction to satisfy their debts where the law in that jurisdiction sanctioned such a procedure and recognized their claims.

II.

The public policy of the Government is to be found in the Constitution, the laws and the course of administration of justice. Contracts are unenforceable whenever a state indicates that such arrangements are repugnant to its policy, and contrary to good morals and justice. Sweeping legislation nationalizing, without compensation to former owners, insurance corporations and other industries is confiscatory in character and contrary to our public policy. This public policy will be enforced to prevent the seizure

of property here against one claiming title under the confiscation decrees. This is so irrespective of the recognition by this government of the sovereignty whose decrees are under review. It is not sufficient for a right to have been duly acquired on the territory of a foreign state to be capable of automatic enforcement. The case is not unseldom when the exception of public order has been employed and the adoption of foreign legislation refused.

III.

The Litvinoff assignment must be strictly construed since private rights are at stake and the sovereign parties are dealing in private causes of action. A logical interpretation of the correspondence and one most favorable to the Government, indicates that a fund of the character held by the Bank as Assignee for the benefit of creditors was not embraced therein. It would appear, moreover, that the decrees were intended to transfer such title as remained after liquidation. An orderly proceeding for the liquidation of claims being in progress in the courts of New York State, the Soviets' attempted assignment was premature, and the United States, being the successor to a party whose title had not ripened into being, could acquire no right under the instrument. An executive agreement cannot deprive private individuals of their vested rights.

IV.

Over the property affected the State Court has possession and control. Since the present suit by the Government has as its object a disposition of the same property, which it is claiming as owner, the action is one in rem. Under such circumstances such possession will not be disturbed by process out of the Federal Court. In the

absence of an express grant the Federal Courts do not have exclusive jurisdiction over controversies where the United States is a party. On the contrary, the Government's rights are fixed by the same principles controlling in actions by private litigants. By intervening in the State Court proceeding the United States, as a claimant, is not being sued directly or indirectly.

ARGUMENT.

I.

The decree under construction, one of confiscation and seizure of private property without compensation, is wholly ineffective to transfer title to property located and situated in the United States.

A.

There is no claim by the petitioner that the fund sought to be recovered in this action was physically located in Russia at the time the Soviet decree was promulgated. On the contrary the fund has been in the State of New York since the creation of the United States branch of the Northern, and since 1911 the property constituting such fund, which consists of cash, stocks and bonds, has either been in the possession of the Superintendent of Insurance under the Insurance Law or the defendant bank. There is thus directly raised the question of whether the Soviet decree was effective to transfer title to personal property which was situate without the jurisdiction of the Soviets. The Soviets may no doubt legislate for and give judgment in connection with property and persons within its own territory. Our courts, however, have never sanctioned a rule of law granting authority to any foreign government to adjudicate upon property not within the territorial con-

fines of the government whose decree, law, judgment, legislation or order is under review. It has been a long-established principle of international law that a foreign law can never affect property situate without the jurisdiction of the law-giver. Our own courts have been uniform in denying effect to foreign laws which sought to operate on property or rights in this or jurisdictions other than that of the country whose laws are sought to be enforced. It is true that the foreign law will be enforced if compatible or similar to our own, but if a conflict appears either because it is repugnant from a standpoint of morals or equity or because of the conflict of legal principles, our courts will sustain the law of the forum rather than the law of the foreign jurisdiction. *Baglin* v. *Cusenier*, 221 U. S. 580; *Hilton* v. *Guyot*, 159 U. S. 113; *Second Russian Ins. Co.* v. *Miller*, 268 U. S. 552; *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404; *Lehigh Valley R. Co.* v. *State of Russia*, 21 Fed. (2nd) 396; *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248; *Hamilton* v. *Accessory Transit Co.*, 26 Barb. 46; *Huntington* v. *Attrill*, 146 U. S. 657; *Oscanyan* v. *Arms Co.*, 103 U. S. 261.

In the instant case the defendant acquired title to the fund in suit as the result of an assignment by the Northern Insurance Company of Moscow, to wit, in 1932, more than a year prior to the recognition of the Russian government. It would be an extraordinary doctrine to say that that title was rendered nugatory and destroyed by a decree made in Russia in 1918, more than 14 years prior to the date of the assignment. The decree by its very language indicates that it was intended to be effective solely within the jurisdiction of the Russian government. The Soviets even so construed it (R. 39, 41). Property rights vested in this country by American courts may not thus be disregarded or transferred by the arbitrary act of a

foreign government where such act consists of a decree or statute penal in its nature and of the type relied upon by the petitioner in this action.

The cases of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, and *Ricaud* v. *American Metal Co.*, 246 U. S. 304, are cited by the petitioner for the contention that our courts are not concerned because title has been acquired by confiscation or other unlawful methods. These cases are readily distinguishable because in each the property in question was located in Mexico, whose decrees and law were under consideration. Careful search has disclosed no instance where either our courts or those of England or France have lent effect to a decree of confiscation where it purported to transfer title or rights located in another jurisdiction.

In *Baglin* v. *Cusenier, supra,* this Court, speaking through the present Chief Justice, stated (p. 596):

> "We are not concerned with their authority under the French law to conduct this business, but it is not the business to which the trade-marks in this country relate. That business is being conducted according to the ancient process by the Monks themselves. *The French law cannot be conceived to have any extra-territorial effect to detach the trade-marks in this country* from the product of the Monks, which they are still manufacturing."

In *Lehigh Valley R. Co.* v. *State of Russia, supra,* Judge Manton, writing for the Circuit Court of Appeals and who, it will be noted, wrote the dissenting opinion in this case, said (p. 401):

> "It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition".

In *James & Co.* v. *Second Russian Ins. Co., supra,* the New York Court of Appeals said (p. 255):

> "The decree of the Russian Soviet Government nationalizing its insurance companies has no effect in the United States" * * *.

In *Hamilton* v. *Accessory Transit Co., supra,* the court had under review a legislative enactment of Nicaragua. The defendant was a Nicaraguan corporation. The decree of the Nicaraguan government purported to annul and abolish the defendant corporation. There was considerable property of the corporation within the United States. The court said:

> "This was an act of despotic power, passed without notice to and without hearing the company, and contrary to the charter granted to it, which provided for the settlement of the disputes between the government and the state, by commissioners to be mutually chosen. *The government had no jurisdiction over the property of the corporation beyond the state of Nicaragua, and its decree (made without hearing the company) was a nullity as to such property.* It may be presumed that, as dictatorial power was assumed by that administration, it could have made a decree absolutely revoking the charter, and that this would have been deemed by other states valid, as to property in Nicaragua * * *."

Mr. Justice Story in *The Apollon,* 9 Wheat. 362, 370, 6 L. Ed. 111, said:

> "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. *They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.* And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction."

The petitioner recognizes that in a long line of decisions the Court of Appeals in New York rejected the present decree and others of similar purport, and held that they could not transfer rights to property located within this country. It is urged, however, that in *Dougherty* v. *Equitable Life Assurance Soc.*, 266 N. Y. 71, which is probably the last pronouncement of the Court of Appeals on the "Russian situation", that the court adopted a view which was a radical departure from its earlier decisions. An examination of that case discloses that, on the contrary, the Court's decision was entirely consistent with the views it had laid down in a long line of cases involving the Russian decrees. The case is easily distinguishable from those which had been passed upon by the Court in its earlier decisions.

In *Dougherty* v. *Equitable Life Assurance Soc., supra,* the Court had under construction a policy of Insurance issued in Russia, delivered in Russia to Russian subjects, which by its very terms provided that in the interpretation of its clauses and in the application of the provisions of the policy or in case of any dispute the parties were to be governed by Russian law. Recognition between Russia and the United States having occurred prior to the decision in this case, the Court of Appeals of necessity gave full force and effect to the Soviet decree which by its terms purported to destroy or confiscate the rights of the policyholders.

In the foregoing case Judge Lehman, in his concurring opinion very aptly pointed out (p. 108):

> "Our earlier decisions, and they are many, refusing to give extraterritorial effect to the decrees of the Soviet government were *not* based on lack of recognition * * * Even before recognition we decided * * * that a confiscatory decree of the

> Soviet government of property situated in Russia results in transfer of title. Even after recognition, we have decided that they were ineffective to destroy rights to property tangible or intangible with a situs elsewhere."

In the present case the defendant bank took the fund in question located in this jurisdiction not subject to Russian law, because Russia was not then recognized, but subject to the Debtor and Creditor Law of the State of New York enacted by the Legislature of such state, and furthermore pursuant to decisions of the New York Court of Appeals and inferior courts of that state declaring title to the funds or the assets to be in the Northern Insurance Company of Moscow, and further declaring that they were distributable here to the creditors and stockholders. To say that these laws and decisions directly affecting title to property in this jurisdiction are to be discarded in favor of a confiscatory decree is to pronounce a new principle of international law which has never been favored by the leading nations of the world.

The petitioner concedes that under the New York Insurance Law, Section 27, the situs of the assets at the time of the enactment of the decree in 1918 was in New York, and further concedes that it remained here at all times, but without support in the authorities, we submit, now urges that this situs was lost when the Superintendent of Insurance concluded his administration of the trust for the benefit of those creditors who had dealt with the United States branch. We shall show on the contrary the situs of the assets has never changed since they were first placed here in 1911. It is submitted that once it is found that the situs of these assets is in this country the government's claim is at an end.

B.

The English courts have refused to enforce Russian decrees where they affect property located in England or outside Russian territory.

The English courts have uniformly denied extraterritorial effect to Russian decrees with regard to property situate outside of Russia. In all of the English decisions examined it will be found that the court has upheld the doctrine that the decrees of the Soviet government were limited in their application to property in Russia.

In the House of Lords' decision in *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1924), A. C. 112; 40 TLR 837; the Lord Chancellor, Viscount Cave, alluding to the above decision, stated at page 840:

> "But the Soviet Government has been recognized by Great Britian as the lawful Government of Russia; and this being so its decrees must, as Lord Justice Bankes said in *Luther* v. *Sagor* (37 The Times L. R. 777; [1921] 3 K. B., 532), be treated by the Courts of this country as binding *so far as the jurisdiction of the Russian Government extends*";

and further, speaking of shares in Russian companies confiscated by a Soviet decree, stated at page 841:

> *"I am unable to understand how such an order could be effective to confiscate or destroy shares held by persons out of the jurisdiction of the Soviet Government";*

and, again, at page 843:

> "* * * but it is plain that there were many English shareholders, and in my opinion the order of January, 1918, did not effectively confiscate their shares."

In *Sedgwick Collins & Co. Ltd.* v. *Rossia Insurance Company of Petrograd* (1925), 1 K. B. (C. A.) 1; 41 TLR 663; the Court of Appeal, per Sargant, L. J., stated at page 666:

> "Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalized' the undertaking and assets of the Rossia Insurance Company; that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. *Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country such as debts owing from debtors here.* See Dicey, Conflict of Laws, 2nd Ed., p. 310, and Lecouturier and Others *v.* Rey (26 The Times L. R. 368; [1910] A. C. 262); an analogous case with reference to the goodwill of, a trade-mark or trade-name in England".

This case later came before the House of Lords, *Employers Liability Assurance Corporation, Ltd.* v. *Sedgwick Collins & Co., Ltd.* (1926), A. C. 95; 42 TLR 749. Assuming, that the liquidation of the Rossia in Russia (it should be borne in mind that the House of Lords, following the decision in the *Mulhouse* case, *supra*, held that the decree of 1st December, 1918, did not dissolve insurance companies but merely placed them in liquidation) might be annulled at some later time, the Lord Chancellor, Lord Cave, said at page 751:

> "If the liquidation should be annulled, the Company will resume its powers; and in the meantime it retains its title to any property not taken away from it—including (in the present case) *the property and rights of the company in countries foreign to Russia,*

which are not effectively taken from it by the Russian legislation."

In The Jupiter (No. 3) (1927), 43 TLR 210, Hill, J., stated at page 215:

> "The decision in Sagor's case (supra) is not in point, for the decree of the Russian Socialist Soviet Republic admittedly had, and it was treated as having, the effect of nationalizing the goods in question, which at the time the decree was passed were admittedly within the territory of the R. S. F. S. R.";

and, directly to the point at issue in that case, at page 217:

> "As to the second question—that is, the question whether the decrees, when they operated, * * * provided for * * * the transfer of its property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. *If the Jupiter was not within the territory of the R.S.F.S.R., I do not see how the mere passing of a decree could transfer the property.* This seems to me to be recognized in all the cases: see, for instance, per Lord Justice Atkin in Goukassow's case (39 The Times L. R. at p. 576; [1923] 2 K. B. (C. A.) at p. 693); per Lord Justice Sargant in Sedgwick Collins & Co., Ltd's case in the Court of Appeal (41 The Times L. R. at p. 666; [1926] 1 K. B. at p. 15); and per the Lord Chancellor in Sedgwick Collins & Co. Ltd's case in the House of Lords (42 The Times L. R., 749; [1927] A. C. 95). The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation".

Mr. Justice Hill's decision was affirmed on appeal, The Jupiter (No. 3) (1927), P. (C. A.) 250; 43 TLR 741; Bankes, L. J., stated at page 743:

> "By a decree made in January, 1918, the whole of the property of this Russian company was nationalized and, therefore, the property passed to the Soviet Republic, *provided that that Republic was in a position to, and did in fact, take possession of the property of the Company, including the Jupiter*".

Although there have been changes which have taken place since those decisions were rendered, in the attitude of the English Courts towards many "Russian questions" particularly with respect to the continued corporate existence of Russian companies, the doctrine denying to the Soviet confiscatory legislation any effect whatever on property situate outside the U. S. S. R. has been strictly adhered to to this day.

In an unreported but particularly pertinent decision in *Woronin, Luetscheg & Cheshire* v. *Frederick Huth & Co.* (1928), K. B., Mr. Justice Wright said:

> "In my judgment these confiscatory decrees have no extra-territorial effect, though they are effective in Russian territory, as was held by the Court of Appeal in Luther *v.* Sagor, supra. This is in accord with the opinion of the Lord Chancellor, Lord Cave, in Employers Liability, &c., Ltd. *v.* Sedgwick Collins & Co., Ltd., supra, and by Lord Justice Sargant in the same case in the Court of Appeal, supra, and Mr. Justice Hill and the Court of Appeal in The Jupiter (No. 3), supra, to which I have referred. The same principles were applied in Lecouturier *v.* Rey (1910) A. C. 262, supra, and in other cases cited in Dicey, On Conflict of Laws, 4th Ed., p. 576, not (h). The recognition by the English Government of the Soviet Government does not affect this conclusion. *The bonds and money in question were at no time within the jurisdiction of the Soviet Government and in my opinion are still the property of the plaintiff company.*"

and gave judgment for the plaintiffs for some £70.000. No appeal was taken.

In *First Russian Insurance Company (In Liquid.)* v. *London & Lancashire Insurance Co. Ltd.* (1928), Ch. D. 44 TLR 583, Mr. Justice Romer said at page 587, speaking of the decree under review in the instant case:

> "Now the decree provides in effect that as from December 1st, 1918, insurance of all kinds within the jurisdiction of the Soviet Government is the monopoly of the State. *For the decree has no extra-territorial effect;* see The Jupiter (No. 3), (43 The Times L. R. 741; [1927] p. 250)".

One of the last reported Russian cases decided by the English courts is *Russian Bank for Foreign Trade, In re* (1933), 133 Ch. D. 745, 49 TLR 253, where Mr. Justice Maugham said:

> "The Soviet decrees, *so far as their jurisdiction extended,* had taken away all the bank's assets, and all its shares had been annulled and destroyed",

He further stated:

> "Evidence had been given disputing that any sum was due to the petitioner, and there was a real question in dispute—namely, whether the debt to him was or was not locally situate in Russia at the date of the relevant decrees. If it was, it seemed to him that the debt was no longer due by the bank as a corporation, and that the petitioner's only claim was against the Soviet State. *If, however, it was recoverable in London, it was not affected by the Soviet legislation, even though it was due to one who was a Russian subject at the date of the decrees*".

We submit that this line of clear and consistent decisions following one another over a period of thirteen

years is conclusive. Foreign legislation cannot affect property situate without the jurisdiction of the law giver.

The petitioner cites *Luther* v. *Sagor* (1921), 3 K. B. (C. A.) 532, 37 TLR 777, in support of the contention that our courts must enforce the confiscatory decree of the Soviets. The reason for the English Court of Appeal upholding a confiscatory decree in that case is readily understood when it is pointed out that there was involved a question of title to goods seized by the Soviets in Russia and *at all times situate and located in that country.* As a matter of fact, Bankes, L. J., was careful to state at page 779:

> "The question before the Court is not one in which the assistance of the Court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in Hope *v.* Hope (8 De Gex, Mac. and G., 731) and Kaufman *v.* Gerson (20 The Times L. R. 277 [1904], 1 K. B. 591). The question before the Court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold by a f.o.b. contract for export to this country."

The petitioner also relies on *Lazard Freres* v. *Midland Bank* decided by the House of Lords in 1932 A. C. 289. Neither the House of Lords nor the Court of Appeal questioned the following statement made by Mr. Justice Roche in the court in which the case first originated. In his unreported opinion, K. B. 1931, the learned Justice stated:

> "There is one consideration which is of overwhelming importance for the determination of this case, namely, that the fund or debt upon which it is sought to levy execution is in England and subject to English law. *It is well settled, and the contrary view*

> *was not contended for on either side in this case, that no Soviet legislation has any force or effect to transfer or confiscate money or property in England* —see Mulhouse case, supra, Sedgwick Collins' case, supra, and The Jupiter (No. 3), supra."

As a matter of fact, this view was, if anything, reaffirmed and given increased dignity by the statement of Lord Wright in the House of Lords, who said at page 289:

> "Both these debts were English debts, payable in England and governed by English law".

Even the prevailing opinion in the Circuit Court of Appeals explicitly adheres to the principle of the strictly territorial effect of foreign laws. Thus, speaking of the Soviet decree, it carefully limits its statements:

> "When our government recognized that Government the public policy of this country to recognize the validity of Soviet decrees *within Soviet territory* was established. * * * The Russian State obviously could, and this record shows that it did, confiscate everything belonging to this corporation *within the confines of Russia.* * * * When the executive branch recognized the Soviet Government, the judicial branch became bound to recognize the validity of Soviet decrees *in Soviet territory.*"

There are printed in the record in this case two circulars, issued by the Soviets construing the decree in question (R. 39, 41). Both were published and issued by the People's Commissariat for Foreign Affairs. One is dated April 12, 1922, and was followed by another dated September 26, 1923. It is stated in the Government's brief in a footnote to pages 33 and 34 that these circulars were "Cited at length and passed upon in *Perry* v. *Equitable Life Assurance Society,* 45 T.L.R. 468 K. B. 1929" and it is said that in that case

the court held that they did not consider them binding as declarations of Russian Law. Examination of that case discloses that it was an action against the Equitable Life Assurance Society, a New York corporation, brought upon a policy of life insurance issued in Russia to a Russian subject. The policy by its terms specifically provided that "all disputes which might rise in connection with the insurance operations carried on by the Society in Russia, should be settled according to Russian laws in Russian courts of justice". The case, therefore, was decided and governed by the same principles, which were applied by the Court of Appeals in *Dougherty* v. *Equitable Life Assurance Soc.* (*supra*). Furthermore, the circular of April 12, 1922, was not even passed upon by the court. Of the two this circular has a definite bearing on this argument, *supra*. This circular, it will be noted, speaking of the decrees very definitely states, "It does therefore, determine only such legal relations pertaining to property rights as arise on territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject-matter is situated outside of the territory of the R. S. F. S. R. and is not connected with such territory, cannot be governed outside of the territory of the R. S. F. S. R. by Russian law, and are,—irrespective of the nationality of the persons entitled to such rights, be they even Russian citizens,—subject to the effects of local law".

The construction put upon the decree by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.

Hastings, etc. Railroad Co. v. *Whitney*, 132 U. S. 357;
United States v. *Moore*, 95 U. S. 760;
United States v. *Johnston*, 124 U. S. 236.

C.

American law is the only law applicable to the determination of this case.

The dispute arises between two parties, each claiming title to the fund in possession of the President and Directors of Manhattan Company.

The defendant in the instant case asserts title by virtue of an assignment made by Northern Insurance Company of Moscow for the benefit of its creditors. Immediately prior to the assignment the Court of Appeals had recognized the existence of the corporation and the fact that it had title to the assets in this jurisdiction. The Court in its decision, which is reported in 255 N. Y. 433 ordered the release of the surplus assets to its then existing directors. The corporation had sufficient vitality to make an assignment for the benefit of creditors (R. 12).

The Court of Appeals expressly held in the case of *Matter of People* (Russian Re-Insurance Company), 255 N. Y. 415, that it would not direct the funds be retained until the recognition of a government in Russia to the prejudice of all creditors and shareholders. In that case, the Superintendent of Insurance had completed the liquidation in New York State of certain Russian insurance companies, and had distributed proceeds to those creditors whose claims arose out of domestic business. A surplus remaining, the question arose as to whether creditors whose claims did not arise out of domestic business, should be enjoined from pursuing their legal remedies against the funds. The Superintendent of Insurance took the position that in view of the hazards and uncertainties in the Russian situation, the surplus should not be paid to anyone, but should be left in his hands until a government recognized by the

United States should function in territory of the Russian Empire. The Appellate Division upheld the contention of the Superintendent and entered a decree accordingly. The Court of Appeals rejected the view of the Appellate Division and reversed the orders. In the course of the opinion, Mr. Justice Cardozo, the then Chief Judge of the Court of Appeals, stated (p. 422):

> "We are unable to accept the view that postponement to the Greek Kalends is the fitting answer to a prayer that the Court unlock the fund, and formulate a plan of release and distribution. * * *
>
> "Liquidation is over, and there has been a fulfillment of the trust for which possession was assumed. Even so, the creditors not within the trust are to be stayed indefinitely and perhaps forever from the pursuit of any remedy, either in equity or at law. We may doubt whether an injunction so unmeasured is consistent with constitutional immunities, and, in particular, with the privilege of access to the courts." (Sliosberg *v.* New York Life Insurance Co., 244 N. Y. 482; Truax *v.* Corrigan, 257 U. S. 312, 334.) "What cannot be doubted with reason is its hardship and inequity. In the silence of the statute, a decree instructing the liquidator as to the administration of the surplus must conform to the exactions of equity and justice. * * *
>
> "The fund being thus subjected to the remedies of creditors, the question must still be answered how the surplus is to be disposed of after such claims have been allowed. We think the surplus then remaining should be paid to the corporations, represented by directors, a quorum of the board."

In *Matter of People* (City Equitable Fire Insurance Company), 238 N. Y. 147, 156, the Court referring to Section 63 of the Insurance Laws, stated:

> "The Superintendent, is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this State or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose."

Numerous decisions in the courts of New York have established the policy that the title of a foreign assignee will not be recognized or enforced in New York State where creditors, whether foreign or domestic, are pursuing their remedies in that jurisdiction.

Matter of Accounting of Waite, 99 N. Y. 433;
Osgood, et al. v. *Maguire*, 61 N. Y. 524, 529.

Particularly where the proceeding was commenced before the intervention of the foreign assignee and prior liens have been acquired by the creditors is this rule true.

Willitts v. *Waite*, 25 N. Y. 577, 586.

In *Hibernia National Bank* v. *Lacombe, et al.*, 84 N. Y. 367, 384, the Court said:

> "The remaining question relates to the claim made by Messrs. Lacombe and others, commissioners appointed by the court in Louisiana. Neither the law nor the adjudication under which they were appointed can have any operation here. They are strictly local and affect nothing more than they can reach. For the rule, as we conceive, is well settled that an assignment by virtue of or under a foreign law does not operate upon a debt, or right of action, as against a person in this State. The plaintiff as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given

> by our statutes. It may enforce that remedy to the same extent and in the same manner and with the same priority as a citizen. Any other construction would make the permission of the statute a form without benefit; a formality, and not matter of substance; a mere delusion. Once properly in court and accepted as a suitor, neither the law, nor court administering the law, will admit any distinction between the citizens of its own State and that of another. Before the law and its tribunals there can be no preference of one over the other. (Abraham *v.* Plestoro, 3 Wend. 548; Johnson *v.* Hunt, 23 id. 91; Hoyt *v.* Thompson, 5 N. Y. 351; Merrick *v.* Van Santvoord, 34 id. 217; Blake *v.* Williams, 6 Pick. 206.)"

In *Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183, the title of the statutory liquidator of a dissolved Pennsylvania insurance company was recognized because his title was in harmony with New York law. The Court at page 192 of its decision expressly held that the title of foreign statutory assignees is recognized and enforced only "where it can be without injustice."

The United States claims title by virtue of a later assignment from the Soviet Government, whose title was allegedly acquired by virtue of the Confiscatory Decree of December 1, 1918.

> "It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor." (U. S. *v.* Buford, 3 Peters, 12, 30.)

Since the issue is title to a specific *res* within the jurisdiction of New York State, the universal successor must submit to the mandate of the sovereignty that has physical control of the property which he desires to reduce to his possession. *Clark* v. *Williard* (294 U. S. 211).

Justice Cardozo in speaking of the rights of the statutory successor of an Iowa corporation in respect of corporate assets located in Montana said:

> "In respect of his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. He must submit to the mandate of the sovereignty that has the physical control of what he would reduce to his possession."

In *Keller, et al.* v. *Paine,* 107 N. Y. 83, 89, the New York Court of Appeals stated:

> "The general rule that the voluntary transfer of personal property wheresoever situated, is to be governed by the law of the owner's domicile, always yields when the law and policy of the state where the property is actually located, have provided a different rule of transfer from that of the state where the owner lives."

To this effect are all authorities.

Warner v. *Jaffray, et al.,* 96 N. Y. 248, 255;
Dearing v. *McKinnon Dash & Hardware Co.,* 165 N. Y. 78, 87;
Hervey, et al. v. *R. I. Locomotive Works,* 93 U. S. 664;
Booth v. *Clark,* 17 How. 322;
Security Trust Co. v. *Dodd Mead & Co.,* 173 U. S. 624.

The creditors before the State Court in the assignment proceeding include: (1) Nationals of the United States who rendered services to Northern in connection with the administration of its assets here*; (2) Officers and directors

*The services referred to are legal in character, rendered by attorneys in connection with litigation in this jurisdiction.

of the Northern who rendered services in connection with the administration of its assets in New York State and elsewhere outside of Russia; (3) Creditors whose contracts† were made with the Northern in foreign countries other than Russia and whose rights to assert their claims have been recognized by the courts of the State of New York. Some of the claims of creditors have been allowed and ordered paid. Their rights should not be destroyed or impaired by Soviet legislation.

It is of no consequence whether the funds on deposit with the New York bank are tangible or intangible.

> "Over this intangible property the State has the same dominion that it has over tangible property".
>
> *Security Bank* v. *California*, 263 U. S. 282, 285.

> "But the question who is the owner of the paper depends upon the law of the place where the paper is. * * * upon the things done being sufficient by the law of the place to transfer the title".
>
> *Disconto-Gesellschaft* v. *U. S. Steel Co.*, 267 U. S. 22, 28;
>
> *Burnet* v. *Brooks*, 288 U. S. 378, 399;
>
> *City Bank Co.* v. *Schnader*, 293 U. S. 112, 118-119.

This rule has been established for a considerable period. It was generally approved by Lord Blackburn in *Castrigue* v. *Imrie*, L. R. 4 E. & I. A. 429. The following is a quotation from the opinion in that case:

> "In the case Gammel *v.* Sewell a more general principal was laid down, namely, that 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere' ".

† The claims mentioned in subdivision 3 arose out of contracts of reinsurance or policies of marine or cargo insurance, which contracts were not subject to Russian law but were made in jurisdictions other than the State of New York.

In *City Bank* v. *Barrow* (1880), 5 A. C. 664, Lord Blackburn said:

> "'The pledge upon which the defendants claim was made in Canada in respect of goods then in Canada. I take it therefore that there is no doubt that the validity of the pledge depends upon the Canadian law'. Lindley, as judge of first instance in this case, all the Judges in the Court of Appeals and all the noble Lords went on the law of Canada as they respectively understood it to be, although the owners of the pledged goods were an English house; thus disregarding the law of the owner's domicile".

(See also Dicey, "A Digest of the Law of England with reference to the Conflict of Laws." Fourth Edition, Chapter 24, page 574, *et seq.*)

In *Alcock* v. *Smith*, 1892, 1 C. H. (C. A.) 238, where the transfer of negotiable instruments was at issue, the Court per Kay, L. J., stated:

> "As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicil of the owner, but upon the law of the country in which the transfer takes place."
>
> * * * * * * *
>
> "* * * there is another equally well-known rule of law, viz.: that a transfer of movable property duly carried out according to the law of the place where the property is situated is not rendered ineffectual by showing that such transfer as carried out, is not in accordance with what would be required by law in the country where its owner is domiciled."

See also:

Maudslay, Sons & Field, In re (1900), 1 Ch. 602;
Swiss Bank Corp. v. *Bolkmische Industrial Bank*, 1 K. B. (C. A.) 673;
The Jupiter (No. 3) (*supra*).

The State can always exercise through its courts jurisdiction over such intangible things as are localized within the State.

> "The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property."
>
> *Pennington* v. *Fourth National Bank*, 243 U. S. 269, 271.

In *Harris* v. *Balk*, 198 U. S. 215, 222, the principle was stated as follows:

> "We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign State when therein sued upon his obligation by his creditor, as he was in the State where the debt was contracted."

In *Chicago, Rock Island, etc., Railway* v. *Sturm*, 174 U. S. 710, 716, Mr. Justice McKenna stated:

> "The proposition that the *situs* of a debt is where it is to be paid is indefinite. 'All debts are payable everywhere, unless there be some special limitation or provision in respect of payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere.' 2 Parsons on Contracts, 8th Edition 702."

While "maxim mobila sequuntur personam" is a governing rule in the case of succession, ab intestato, disposition by will, and marriage settlements, it has no application to the present case. The cases cited by the government on situs state the limitation imposed by the Supreme Court of the United States upon the exercise of jurisdiction to tax by the various States. "No case has extended, the principal by which the taxing power of the State has been limited to impose similar restrictions upon the exercise by the State of jurisdiction for any other purpose." (Restatement of the Law of Conflict of Laws, Section 50, Special Note.) See also: Westlake, "A Treatise on Private International Law" with principal reference to its practice in England. Seventh Edition, page 193, *et seq.*

The government contends that the property, *i. e.*, an amount due from an American National is located here for the purpose of construing the Litvinoff assignment, but is located in Russia for the purpose of interpreting the Confiscatory Decree.

> "Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one State, carries with it an implicit denial that there is a local situs in another State for the purpose of transferring the same thing there."
>
> *First National Bank* v. *Maine*, 284 U. S. 312, 326.

If both titles be examined, not independently, but as competing with one another, we have on the one hand:

> (a) The Manhattan Bank claiming by virtue of a transfer of property duly carried out according to the lex situs and the lex fori—which title grounded in American law is distinctly good;

and on the other hand

> (b) The United States asserting title based on a double transfer—the Soviet decree and the Litvinoff assignment. The Soviet decree was good according to the lex domicilii and the lex actus but distinctly bad according to the lex situs and lex fori and therefore the United States acquired nothing.

In addition to this the question of priorities, essentially a matter of procedure and governed by the lex fori, favors the Manhattan Bank.

> "Iowa may not say, however, that a liquidator with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry into another State the rule of distribution prescribed by the statutes of the domicile."
>
> *Clark* v. *Williard, supra.*

In the interregnum between the establishment of a foreign government in power and its recognition by this government its decree is not entitled to any comity. During such period whatever has been done in our courts is not subject to attack and must be regarded as *res adjudicata* and valid against the world.

> *Rose* v. *Himely*, 4 Cranch. 241;
> *Gelston* v. *Hoyt*, 3 Wheat. 246.

The government asserts that the transfer is governed by Russian law. The courts do not take notice of foreign laws. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445; *Hanley* v. *Donoghue*, 116 U. S. 1, 4; but the same must be pleaded and proved.

II.

The enforcement of the Soviet decree is repugnant to the policy of American law.

A.

Giving full effect to the decree under construction, it must, arguendo, be held to be a fiat or pronunciamento, the purpose of which is to arbitrarily dissolve Russian insurance corporations and allegedly confiscate or appropriate their property. The government so pleads (R. 3).

There is no pretense nor assertion by the petitioner that the means or method adopted by the Soviets followed due process of law or provided any method of adequate or other compensation to the corporation or its owners, or that the method of seizure is one consonant with our laws or known to American jurisprudence. It must be conceded that the result obtained by the Soviets is tantamount to the seizure of private property through the same methods pursued by lawless banditry.

No cases have been cited by the petitioner which satisfactorily indicate that our courts, Federal or State, will sustain a position that private rights can thus be annulled and property located in this country can be transferred to a Government located in another country in such an extraordinary fashion. It is, therefore, submitted that the very nature of the decree under review offends the background of our political and judicial institutions. The Northern Insurance Company of Moscow, having established a branch office in this country and located a fund here, is entitled to the full protection of our laws and the public policy underlying them.

In *Russian Reinsurance* v. *Stoddard*, 240 N. Y. 149, 163, the Court of Appeals said:

> "We give or deny the effect of law to decrees or acts of a foreign governmental establishment in accordance with our own public policy; we open or close our courts to foreign corporations according to our public policy, and in determining our public policy in these matters common sense and justice must be consideration of weight."

In *German-American Coffee Co.* v. *Diehl,* 216 N. Y. 57, 63, the same Court said:

> "As long as a foreign corporation keeps away from this state, it is not for us to say what it may do or not do. But when it comes into this state, and transacts business here, it must yield obedience to our laws. (Sinnott *v.* Hanan, 214 N. Y. 404, 548.) For many purposes the fiction of its residence in the state of its origin must then be disregarded. (Lockwood *v.* U. S. Steel Corp., 209 N. Y. 375, 385; St. Clair *v.* Cox; 106 U. S. 350, 355.)
>
> "* * * In these days, when countless corporations, organized on paper in neighboring states, live and move and have their being in New York, a sound public policy demands that our legislature be invested with the measure of control. * * * Even if the prohibited act is done in the home state, it may be so bound up in its results with the business in this state that we cannot view it with indifference."

The highest Court in Illinois stated in *Warren* v. *1st National Bank,* 149 Ill. 9, 25 L. R. A. 746:

> "It is the charter alone which, by the law of comity, is recognized and enforced in other jurisdictions and not the general legislation of the state in which the company is formed. The general laws and regulations of a state are intended to govern only within the limits of the state enacting them, and the state can have no power to give them extra-territorial force. Such provisions do not, as a rule,

> enter into contracts made within the state, if they are to be performed in another jurisdiction. It follows, therefore, that where a state statute is enacted for the enforcement of a local policy only it will not be presumed that such statutory provisions were intended by the state, to enter into the charter contract, and to regulate the company in its transactions outside of the state, and they will not affect the validity of the dealings of the company in foreign states. 2 Morawetz Priv. Corp. sec. 967."

To compel the defendant bank, the assignee of this corporation, to deliver the fund lawfully received by it upon the assertion of legality of this decree, which legality, it is claimed, comes through recognition of Russia by our Government, is plainly inconsistent with abstract justice, morals and equity. It is no answer to say that because of diplomatic recognition we have stamped approval upon the acts of a foreign country. All foreign laws of a penal or confiscatory nature are subject to review in our courts. Enforcement of decrees, legislation and orders of a friendly nation is frequent and not unusual, but there is, to our knowledge, no universal rule of application which compels such enforcement if the result is stultifying or obnoxious to our courts or so revolting that it transcends our conception of private rights in property located here.

In the instant case the rights of American nationals are involved as well as those of Russians. Moreover, included in the group of creditors who are entitled to the protection of American laws and who may rely upon American public policy with respect to penal statutes, are citizens of foreign friendly powers, *i. e.*, France, Germany, England, etc. Whatever may be the rights of the Soviets to legislate within their own territorial confines, it is unthinkable that a decree of the character here involved may annul vested rights of the creditors referred

to in a fund located here. This right would exist without prior judicial sanction. Here the creditors have been led by solemn utterances to believe that their rights were the subject of protection.

Great stress is laid by the petitioner on the retroactive effect of recognition. We seek no quarrel with the general application of this doctrine, but, like many doctrines of that character, it must bow to well recognized exceptions.

It has been intimated that the Executive Department by the acceptance of the assignment has declared the public policy of this country. That the Chief Executive may arbitrarily strip the Legislature and the Courts of any visitation or inquiry or examination on his acts in this connection is a heinous idea, and the decisions by no means support such a far-fetched suggestion. In *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 655, the Court said:

> "The public policy of the Government is to be found in the Constitution and the laws, and the course of administration and decision. License Tax cases, 5 Wall. 462; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340."

In *Huntington* v. *Attrill*, 146 U. S. 657, 675, this Court quoted with approval the following pertinent language from the case of *Higgins* v. *Central New England R. Co.*, 155 Mass. 180:

> "These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do sub-

> stantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction."

The New York Court of Appeals considered the effect of Soviet decrees after recognition in *Vladikavkazsky Ry. Co.* v. *New York Trust Company*, 263 N. Y. 369. In that case the plaintiff brought an action to recover a deposit of funds in the New York office of the defendant banking institution. The property was located here. It was argued by the defendant company that the Russian railway company was dissolved by the ukase or legislation of the Soviets. The defendant bank contended that whatever notions or views the Court of Appeals may have entertained before recognition, it was bound to enforce the decree of confiscation and dissolution as a matter of comity. This contention, the same as that asserted by the Government in this case, received short shrift in the opinion rejecting it (p. 378):

> "It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, *is contrary to our public policy and shocking to our sense of justice and equity.* That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. (*Baglin* v. *Cusenier*, 221 U. S. 580.)
>
> "We enforce the same principle even in regard to statutes of sister States. (*Barth* v. *Backus*, 140 N. Y. 230, 239.)

> "The fact that the present Russian government was not recognized was not the basis of our refusal to give effect to its decrees nationalizing corporations and confiscating their property. During the period when those decisions were made, we recognized and enforced 'mere ordinary legislation' relating to 'every day transactions of business or domestic life.' (*Petrogradsky M. K. Bank* v. *National City Bank*, supra; *Matter of People* (*First Russian Ins. Co.*, 255 N. Y. 428, 432.)
>
> "Prior to recognition we clearly intimated that our decision would have been the same if at the time recognition had been granted. (*James & Co.* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 257.)"

Other cases, such as *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Ritter* v. *U. S.*, 28 Fed. (2nd) 265; *Walker* v. *U. S.*, 139 Fed. 409, and *Cook, et al.* v. *U. S.*, 91 U. S. 389, all support the doctrine that legislation or contracts which conflict with our concepts of right and justice will be rejected and will not be enforced by our courts.

In *United States* v. *Juan Percheman*, 7 Peters 51, 86, 8 L. Ed. 604, this Court said:

> "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."

We submit that where a foreign law seizes or attempts to seize private property located in this country, there is an immediate conflict not only with our own public policy but,

moreover, an invasion of the constitutional rights of those who have title to the property in this country or who are entitled to some interest therein.

Even Circuit Judge Manton, in his dissenting opinion in the Court below, gave recognition to a fundamental principle of our Government and courts when he said:

> "* * * The public policy of the country may be declared in our Constitution."

We submit that the Constitution by its very language has very specifically and unequivocally indicated that to enforce this decree would be contrary to constitutional guarantees.

Amendment V—the so-called "Bill of Rights"—which became law and part of the original Constitution on December 15th, 1791, reads, in fine:

> *"Nor shall property be taken for public use without just compensation."*

Where the Constitution, as here, clearly prohibits certain acts which, from their nature, may be imputed either to the individual or to any of the three departments of the Nation, no such act, nor any consequence thereof, may be tolerated by the courts—the guardians of the Constitution —still less may they condone acts of the Executive based on such prohibited act.

The strict prohibition applies to all three departments: thus, the Executive cannot take private property without just compensation, be it through the intervention of the armed force placed at its disposal by the Constitution, or through the exercise of the treaty-making power which it shares with the Legislative; neither may the Legislative do it by statute; nor may courts adjudicate to that effect and

purpose, nor condone any prohibited acts by whomsoever performed.

And it is inconceivable that, while prohibiting an act, the Constitution should tolerate its indirect performance, or its consequences. The Constitution, if anything, is the basic declaration of the public policy of the Nation, of those principles by and through which the people of the United States willed to be governed and under the sway of which they have expressed their unequivocal intention to live.

It is not conceivable, we say, that, to take an example, the people of the United States, when enacting the XVIII Amendment, would have allowed their Executive to carry on liquor-trade abroad, or, when enacting the XIII Amendment (abolition of slavery), would have tolerated their Executive to exploit slaves in Brazil.

In the same manner let it not be said that the Constitution has nothing to do with the exercise by the Executive of certain proprietory rights which it alleges to have acquired from a foreign sovereign State, not bound by the V Amendment. It is a commonplace of jurisprudence that a right cannot be based on an injustice and that obvious principle, if anything, has a stronger binding force on the Executive who represents the whole Nation than on a private individual.

Nor may it be said that no actual injustice will be done if the Court recognizes and enforces a title based on injustice in this one specific case. Private interests are at stake and private interests will be injured if this Court—the supreme guardian of the Constitution—should set its seal to acts of spoliation performed in flagrant violation of the Constitution. When even once a private right is sacrificed in deference to the Executive, there is no limit to the application of the exception.

B.

The French courts have held the decrees to be directly opposed to French public policy.

The views of the English courts have been shown and demonstrated under an earlier point. The French courts have uniformly resented and declined to enforce decrees of spoliation and plunder. Their decisions are entitled to weight and reference.

The first important decision rendered by a French Court after recognition of the Soviet Government in 1924 is one by the Aix Court of Appeal in *Etat Russe c. Ropit,* Aix, 23,12.25; 53 Clunet 667. This was an action by the Soviet Government to recover a fleet of steamships belonging to "Ropit", a nationalized Russian Company. The claim was dismissed.

The French Court said:

> "Whereas the appellant claims to justify his action through the act of recognition *de jure* of the Soviet Government by the Government of the French Republic, such recognition being alleged to entail the applicability to Russian subjects, even before foreign jurisdictions, of the legislation initiated by them in 1918; Whereas the resumption of diplomatic relations between France and Russia did not, and could not, have such a general bearing; that it is not admissible to maintain that the French State through the *de jure* recognition of the Soviet Government has *ipso facto* agreed not to reject such legal enactments as might appear to him /the French State/ contrary to his own concept of the national public order; * * * That, while the recognition does not permit any more to the French Judge to ignore Soviet law and to reject it systematically as a whole, it does not prevent him from examining in each case the letter and the spirit thereof, nor from denying it any legal

effect if he considers it injurious to the essential principles of the political and social structure of France. Now, whereas the Soviet decree nationalizing property in Russia,—even such as belongs to foreigners,—the owners thereof not receiving a previous and just compensation, is plain and unalloyed confiscation, a *coup de force* of the State against the individual, with the purpose of abolishing,—according to the very terms of the Constitution of the U. S. S. R.,—private property and of establishing the dictature of the prolétariat; **that such legislation offends the very basis of the French juridical structure which rests on the respect for property and for the inviolability of the rights property gives birth to; that it can, therefore, be neither directly nor indirectly applied before a French Court * * *"**

That decision was affirmed by the Supreme Court of France—the Cour de Cassation—*Etat Russe c. Ropit*, Cass. (Req.), 5.3.28; 55 Clunet 674; from which we quote the following passages:

"Whereas, while in principle the Courts of a State, when asked to examine a legal set of facts which arose under a foreign legislation, are bound to do so applying foreign law, that rule binds them insofar only as the application of the foreign law, or the respect due to rights acquired under such law, does not interfere with the principles or stipulations of their national law considered as essential for the public order; Whereas, according to Article 545 of the *Code Civil*, no one in France may be compelled to surrender his property, unless it be for public use and in consideration for a just and previous compensation; that this rule, inserted in our Codes and asserted in our successive Constitutions, is one of the fundamental bases of our social institutions; that it cannot be made to yield before the stipulations of foreign legislation without profoundly dis-

turbing the order established on the territory of the Republic; And whereas the Soviet decree of 26th. January, 1918, declares the nationalization of the Russian commercial fleet without providing that a previous and just compensation shall be awarded to the dispossessed owners; that said decree institutes thereby a mode of acquisition of property which cannot be recognized by French Tribunals * * *".

In *Vairon & Cie c. Banque de Commerce de Sibérie*, Bordeaux, 2.1.28; Gazette du Palais 22.5.28; the Bordeaux Court of Appeal drew a line between those provisions of Soviet legislation which were, and those which were not, contrary to French public order. It held that the dissolution of corporations had nothing objectionable in it *per se*, and could not be ignored, but that confiscation was radically incompatible with the fundamental principles of French Law:

"Whereas * * * on 28th. October 1928 the French Government recognized the U. S. S. R.; that it follows that the French judicial authority cannot henceforward consider as non-existent as a whole the entire new Russian legislation; but that in case of litigation between private parties where French law is opposed to Russian law the conflict must be resolved according to the rules of Private International Law; Whereas, of course, Russian legislation cannot be forced upon French Tribunals whenever it is incompatible with the French public order; that in that respect the plain and unalloyed nationalization of banks without compensation is directly opposed to essential principles of French public law based on the irrevocable nature of the right of ownership; That it is none the less a fact that Russian banks have ceased to exist; that that abolition, considered in itself, and apart from the confiscation which followed it, is not in contradiction with French law * * *".

That decision was affirmed on appeal, Cass. (Req.), 29.7.29; 57 Clunet 690.

The same principles, in similar terms, have since been invariably applied with regard to Soviet decrees nationalizing Russian corporations and confiscating their assets (see, *e. g.: Nord de Moscou c. Union & Phoenix Espagnol*, Paris, 13.6.28; 56 Clunet 112; *Crédit d'Anvers c. Crédit Lyonnais*, Cass., 25.2.29; 56 Clunet 1306; *Cockerill c. Union & Phoenix Espagnol*, Paris, 23.12.30; 58 Clunet 403; *Vve Lalande c. Banque Russe pour le Commerce Etranger*, Trib. Com. Seine, 29.6.32; 61 Clunet 668; *Société Wildenberg c. Comptoir National d'Escompte de Paris*, Trib. Com. Seine, 15.1.34; 61 Clunet 657).

The decisions were not different, nor were they differently grounded when the Courts had to examine the application to Russian nationals of other Soviet decrees of a similar confiscatory nature.

Thus, in *Bessel c. Société des Auteurs et Compositeurs Dramatiques*, Trib. Civ. Seine, 14.2.31; 59 Clunet 113; it was held that the Soviet decree abolishing copyright could not be applied by the French Courts:

> "Whereas moreover the Soviet law of 26th. November 1918 cannot be applied in France, inasmuch as Courts can apply foreign laws only so long as such application is not injurious to the principles and stipulations of their national laws considered as essential for the public order. Whereas said law of 26th. November 1918 institutes in favour of the State a mode of acquisition of property which cannot be recognized by French Courts * * *".

and in *Dame Wiesbein c. Chabrol*, Trib. Civ. Seine, 18.2.32; 59 Clunet 444; it was held that the Soviet decree limiting to an amount of 10.000 roubles the right of succession could not be applied:

"Whereas such confiscation is contrary to the French public order and cannot be held valid and effective in this country * * *".

It is apparent therefore that every court which has examined these decrees has held them to be an affront to justice and of no extra territorial force. It has always been the primary policy of our courts, in preserving an energetic and correct tone of morals, to reject unjust and arbitrary laws. In consequence of this principle neither foreign nor domestic usurpation flourishes on our soil.

III.

The language of the Litvinoff letter does not include a claim against the respondent.

A.

Long prior to the exchange of correspondence between our government and Russia, the *res* had been transferred within the sovereignty having jurisdiction of the same to the assignee for the benefit of creditors. The assignment passed title eo instanti to all the property involved. *Crapo* v. *Kelly*, 16 Wall. 610. This transfer took place at a time when the power of the corporation here to do so was established.

The title to the property having been determined by the New York courts, that title travels with the thing in all its future progress. *Rose* v. *Himely*, 4 Cranch. 241; *Gelston* v. *Hoyt*, 3 Wheat. 248.

That part of Litvinoff's letter pertinent to the issues here can be found in the following wording:

"agrees that * * * the Government * * * will not * * * initiate any new litigations for

> the amounts admitted to be due or that may be found to be due it as the successor of prior Governments of Russia or otherwise, from American nationals * * * and does hereby release and assign all such amounts to the Government of the United States * * *".

This Court, before it can sustain the position of the complainant, must find that the money presently in the custody of the defendant Bank is either an amount admitted to be due, or that may be found to be due the Soviet Government. It certainly is not contended by the Government that there is any amount *admitted to be due* by the defendant Bank to the Soviet; therefore, it remains to be seen whether there is any amount *that may be found due* by the defendant to the Soviet Government and, in turn, to the complainant as the assignee of that Government.

It is elementary, of course, that the complainant gets no greater rights under the so-called letter of assignment than the Soviet had (*United States* v. *Buford, supra*). It further follows that the rights of the complainant are to be decided and governed by the relationship, whether factual or resulting by operation of law, existing between the assignor of the Soviet Government and the defendant.

It must be conceded, and we assume will be admitted, that the Bank had no dealings nor contractual obligations with the Soviet Government. There was never at any time any relationship of debtor and creditor between the Soviet Government and the defendant Bank.

Nor was there ever any such relation between the Northern and the defendant Bank. The assignee traces its title back to the Northern and it certainly cannot be seriously argued that there is any amount due from the bank to the Northern, or any amount which could be found due from the bank to the Northern. The defendant Bank is

not a debtor of the Northern, and never has been. The implication which necessarily flows from the language of Litvinoff's letter is that there is a debt owing by an American National. There is nothing owed by the defendant Bank, an American National.

The Government mistakes the intention of the letter. Clearly, if the defendant bank had received the funds of the Northern as a deposit there might be some force in the argument that a relationship of debtor and creditor existed between the Northern and the defendant bank, but to hold under Litvinoff's letter that an assignee for the benefit of creditors owes an amount to the Soviet Government is to give it an unnatural interpretation and one that its language and wording were never intended to convey. While the defendant functions under the Debtor and Creditor Law, the debtor referred to in the title of the Act is obviously the *assignor,* and not the assignee.

The word "due", used in the sense that it was used in this letter, obviously imports a debt or something owed by the American National. We have clearly shown that nothing was ever owed by the bank, either to the Northern or to the Soviet Government. The fund in the hands of the defendant Bank belonged to the Northern Insurance Company subject to the claims of creditors and stockholders. This Court, before it can sustain the government's position, will necessarily be obligated to decide that a debt is owing by the bank and we respectfully submit upon this record that this cannot be done.

The word "due" has been the subject of judicial definition.

In *Feeser* v. *Feeser,* 15 Atl. 406, it was defined generally to be "that which is owed".

In *Rutez* v. *Sagamore Valley Mutual Fire Ins. Co.,* 94 N. W. 191, the word was construed to indicate a debt.

In *Yocum* v. *Allen*, 5 N. E. 909, it was held that the word imported a debt matured.

In the *U. S.* v. *Bank of North Carolina*, 31 U. S. 29, it was held that in its primary sense the word "due" means "owing".

The word "due" is derived from the French verb "devoir", meaning "to owe", and from the Latin "debere", meaning the same.

In Webster's New International Dictionary of the English Language, the word is defined as "owed or owing; as a debt; of the nature of a financial obligation; that which is due or owed; debt; that which one contracts to pay; * * *."

In Webster's Daily Use Dictionary the word "due" is defined as "owed or owing; payable".

From the foregoing, it is therefore quite apparent that what was intended by the letter was the assignment of a debt due, but not some nebulous claim.

If this matter was sought to be governed by the letter, or if this particular situation was contemplated by the respective governments, it was a simple enough matter to have inserted an express provision in the letter covering the situation we are dealing with here.

This was done in the case of the claim of the Russian Volunteer Fleet. We all know that recognition did not occur overnight, but was the subject of tedious and prolonged negotiation between the two governments. Ample opportunity was present for careful and deliberate wording and since the Litvinoff letter excludes any claim against this defendant, there is no reason nor justification for interpolating it by giving the letter a peculiar construction or one contrary to its intended phraseology.

B.

Only property remaining after liquidation passes to the Soviets.

The Government claims, however, that the correspondence does cover the funds in question because the Northern Insurance Company in New York held the funds for the Soviet Government, as successor to the dissolved corporation and that this obligation is equally binding on the Bank, as assignee. There is no debt owing by the Northern Insurance Company in this jurisdiction to the Soviets which its assignee is obligated to pay.

Of course the agreement transferred nothing to which the sovereign had no right of property. *Mitchel* v. *United States*, 9 Pet. 711. A proper interpretation of the decree shows that only "after" liquidation does title vest in the Soviets, hence the attempted assignment and the present action are premature.

A translation of the decree will be found at pages 8, 35 and 36 of the record, but the Court will observe in the affidavits of Russian experts, submitted in opposition to the Government's case, that there is a sharp conflict with respect to the correctness of the translation. In fact, one marked and important sentence is admitted to have been erroneously interpreted, or, as stated in the letter of the Department of State, "inadvertently" omitted (R. 34); (affidavits of Valentin Glasberg, R. 30, 31; and William G. Welliaminoff, R. 37, 38).

It will be noted that the decree shows a very marked distinction between public and private insurance corporations:

> "(a) *private* insurance organizations,—the Northern being one of them,—are made subject to *liquidation*, i. e., must be wound-up by the ordinary process

entailing in the first place the discharge of their liabilities;

"(b) public insurance organizations,—municipal and rural,—are directly proclaimed *the property of, and title to their assets* is forthwith vested in, the State."

Should the language used in article 2 of the decree in making the distinction between private and public insurance organizations and in defining the different treatment meted out to them present any doubt whatever, the same will be dispelled if one examines closely the "Note" to article 3 of the decree.

This "Note" has been mistranslated in the exhibit to the U. S. affidavit. That translation reads: "The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, *disclosed* at *the time of their liquidation,* become the property of the R. S. F. S. R." (R. 9). The italicized words do not accurately translate the Russian text. The Russian means clearly: "*disclosed* (or: *which will be left over*) AFTER their liquidation."

Such a translation of the decree finds judicial support in *Perry* v. *Equitable Life Assurance Society,* 45 T.L.R. K. B. 1929), where Mr. Justice Branson at Kings Bench said:

"The first question of Russian Law is as to the effect of the monopolization decree made on November 28, 1918, and published in December of that year. The decree is perfectly general in its terms. Insurance in all its form is declared a state monopoly and all private insurance companies and organizations (bond shareholders and mutual) are to be *liquidated and their entire property remaining after liquidation is to pass to the State.*"

If the purport of the decree had been to vest title in the Soviets to all its assets, then no purpose would be served by distinguishing between public and private insurance organizations and by providing for these latter that only such assets as may remain *after* the liquidation shall become the property of the State.

In whatever light the correspondence is viewed it will be observed that there is no amount due from an American National.

C.

The interpretation adopted by sovereign parties should not be controlling where private rights are at stake.

"No construction of a treaty which would impair that security to private property which the laws and usages of nations could confer without express stipulation is admissible further than its positive words require." *Strother* v. *Lucas*, 12 Pet. 410, 438; *The U. S.* v. *Reynes*, 9 How. 127.

It is true that the courts are bound by the executive department's pronouncement that a treaty or an assignment has been made or accepted. Similarly the parties here could not question that recognition had been granted to the Soviet Government. It cannot be established, however, that the Court is denied the right to interpret an executive agreement, a document of lesser dignity than a treaty, when the courts are replete with decisions covering the interpretations of treaties and construing their language.

"The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty

itself." *Jones* v. *Meehan*, 175 U. S. 1, Moore, International Law Digest, 1906, Vol. 5, Section 760, page 234, *et seq.*

"M. d'Argaiz seems to think that a treaty stipulation cannot be subjected to the interpretation of the judicial authority, and proceeds to remark that, 'if the courts of the Union possess the right of interpreting, considering, and deciding upon treaties contracted between nation and nation, and the executive power cannot inquire whether their decrees are or are not conformable with justice, it would be as well to declare that in order to give to treaties the force of treaties, or, at least, to render them obligatory, they should be concluded with the judicial power, or, in better words, that treaties should be made, for them to be afterward interpreted as the courts might think proper.' But the undersigned supposes that nothing is more common, in countries where the judiciary is an independent branch of the government, than for questions arising under treaties to be submitted to its decision. Indeed, in all regular governments, questions of private right, arising under treaty stipulations are in their nature judicial questions. With us a treaty is part of the supreme law of the land; as such, it influences and controls the decisions of all tribunals; and many instances might be quoted of decisions made in the Supreme Court of the United States, arising under their several treaties with Spain herself, as well as under treaties between the United States and other nations. Similar instances of judicial decisions on points arising under treaties may be found in the history of France, England and other nations; and, indeed, the undersigned would take the liberty to remind the Chevalier d'Argaiz that this very treaty of 1795 has been made the subject of judicial decision by a Spanish tribunal.

"The undersigned would call to the recollection of the Chevalier d'Argaiz the case of Mr. D. Hareng, in which the Spanish colonial courts decided accord-

ing to their sense of the intention of the treaty of 1795, and the intendant confirmed their decree, which was, that nothing in that treaty exempted Mr. Hareng from the payment of certain demands. From this decision this government was inclined to dissent, but never questioned the right and duty of a Spanish court to consider the intent and effect of a treaty."

Mr. Webster, Sec. of State, to the Chev. d'Argaiz, Span. min., June 21, 1842, relating to the case of the Amistad, Webster's Works, VI. 399, 400. Moore, International Law Digest, 1906, Vol. 5, page 236, *et seq.*

It has never been doubted that our American form of democratic government operates as a government of laws and maintains its balance under the system of the separation of the executive, legislative and judicial departments. The statement in the Government's brief and the dissenting opinion of Judge Manton below to the effect that an assignment should be considered as liberally as the exigencies of the case may demand, might be true if it were strictly limited to a stipulation involving solely mutual relations of states in their sovereign capacity, *i. e., jure imperii.* Such questions as is well known are exclusively governed by the principles of international law. They escape as such the jurisdiction of municipal courts, and in the absence of submission to international tribunals are the subject-matter for diplomatic negotiations and in the last resort for war.

But it is a commonplace of legal science that municipal courts not only have the right but the duty to interpret an international instrument, when such international instrument concerns private rights, and in so doing, they are bound by rules of strict interpretation with regard to stipulations in such international instruments involving

private interests. The primary duty of the Courts is the protection of private rights. Thus no infringement of a private right will be tolerated, unless an unequivocal stipulation in the instrument is subject to that interpretation. The presumption is always in favor of the individual. This is all the more so when a relevant provision of the international instrument subject to interpretation has been made by the states not in their sovereign capacity, but in their private one—*jure negotii*. That that is so the prevailing opinion in the court below has held: "Though sovereign powers have been dealing with each other they have been dealing *in private causes of action*".

No foreign law is ever applicable as of right, but such application is always a gracious act on the part of the sovereign represented by its court.

"The application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants whether native or foreigners." Dicey, "A Digest of the Law of England", with Reference to the Conflict of Laws, Fourth Edition, page 9, *et seq.*

An executive agreement like a treaty should be construed in accordance with the state of things at the time existing. *Strother* v. *Lucas*, 12 Pet. 410. At the time the Litvinoff assignment was made the fund in suit was under the jurisdiction of the Supreme Court of the State of New York and subject to the claims of creditors who had filed their claims in that proceeding. The United States was, as a result, bound by the pendency of the New York State Court action and the proceedings that had taken place therein, and the existence and approval of prior claims filed against the fund in the possession of the State Court.

Property acquired by treaty is subject so far as concerns titles to property and prior rights of status, to the same law as it was subject to before the transfer. *United States* v. *Moreno*, 1 Wall. 400.

D.

The executive agreement is ineffective to destroy individual rights.

The assignment relied on by the complainant is one conditional in its nature and of limited duration. The language of the letter of November 16, 1933, states in effect that the Soviet Government obligated itself not "to initiate any new litigation for amounts * * * that may be found to be due it" and "does hereby release and assign all such amounts to the Government of the United States" but this only "preparatory to a final settlement of the claims and counterclaims between the Governments of the United Soviet States of Russia and the United States of America * * *". In other words, this was only a preliminary arrangement anticipating a final settlement and premised on the consummation of pending negotiations. Secretary of State Hull's recent communique issued at the State Department on January 31, 1935, contains the following pronouncement: "In view of the present attitude of the Soviet Government, I feel that we cannot encourage the hope that any agreement is now possible. * * * There seems to be scarcely any reason to doubt that the negotiations which seemed so promising at the start must now be regarded as having come to an end."

If, indeed, the official of this country in charge of such matters clearly states that negotiations are decidedly concluded, what force can the agreement have?

The assignment in question is an executive agreement not a treaty. It is an arrangement to effect the purposes more usually accomplished by the more complex machinery of treaties.

A treaty is ineffective to operate on individual rights until ratified.

Haver v. *Yaker*, 9 Wall. 32;
Montault, et al. v. *The U. S.*, 12 How. 47;
United States v. *Arredondo*, 6 Peters 691.

In *Haver* v. *Yaker* (*supra*), the court stated (p. 34):

"It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in Arredondo's case, reported in 6th Peters. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to have him bound by it, as the law of the land,

until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned."

The Government has cited Vol. 78 of the Congressional Record, pages 460-461 of Proceedings before the Senate on January 11, 1934, and has made the broad statement that our legislative branch of the government has tacitly approved the declaration of a policy adopted by the President of the United States in his recognition of Russia. The inference necessarily flows from the statement of the Solicitor General that our Senate has lent support to the methods of lawlessness and piracy pursued by the Soviets. An examination of the Congressional Record in the volume referred to discloses that all the Senate had before it on the occasion we are referring to was the submission for confirmation of the nomination of one W. C. Bullitt as the diplomatic representative of the United States in Russia. In place of any tacit approval of the so-called public policy enunciated by our highest Executive, there was instead the most severe condemnation of the methods and practices of the Government whose decree is now before us. The footnote will disclose some of the speeches made by our senatorial representatives, in which it is disclosed that their own knowledge of recognition was not official but derived from newspaper reports, and, moreover, that they accepted the protestations and assurances of the Soviets that there would be good faith behind their promises with considerable doubt. It will be noted that there were references by Senator Robinson to the rather distressing and unfortunate experience of other great nations of the world who had

recognized this country, *i. e.*, Great Britain, France, Italy, China and Japan.*

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*Jan. 11, p. 460:

Mr. Vandenberg: My motion sought the full official information respecting the arrangement which has been entered into governing the contracts and the warrants which were to exist between these two countries. The only information heretofore available to the Congress on the subject, the only information available to the Committee on Foreign Relations, has been the casual information given in the newspapers. It would not seem to me appropriate that in a matter of this long standing and often bitter controversy, and in a matter of this major importance in the opinion of many of the American people, that the Senate and the Foreign Relations Committee should be guided solely by what they had seen in the public prints.

P. 461:

Mr. Vandenberg: The Senate has partnership responsibility with the Executive for our foreign relations, and complete mutual information is at all times desirable, but there are some things that cannot be rubber-stamped, no matter what our faith.

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Mr. Vandenberg: * * * The reason fundamentally that I have opposed the recognition of Russia is that we, too, have a right to elect our own form of government without any outside interference, and so long as the Russian government was engaged in subversive propaganda officially or semi-officially, directed from Moscow in any degree—propaganda aimed at the destruction of our form of government within our own United States—that we had no justification whatsoever in governmental philosophy or ethics or international fair play to accept on the basis of common partnership and parity in the family of nations, an institution of that obnoxious character.

P. 468:

Mr. Vandenberg: I concede that the recognition of Russia is exclusively an Executive function and prerogative, and we cannot pass on it even if we would. The President has acted in his own right and the decision is beyond our recall. That question is not before us. To be sure, we could decline the confirmation of the ambassador and then we could decline the confirmation of his successor if such were our wish; but this would not affect the fact of recognition, and we would be in the anomalous position of not having a representative of our own to guard our interests in Moscow but of having a representative of Moscow in the United States. * * * Therefore it seems to me, in the sheer logic of the case as I argue it out to myself and to the Senate, that the act of recognition is complete, it is not a matter upon which the Senate can pass. If the Senate were passing upon that, I am not clear that even now, in the face of these warrants, I would be satisfied to vote in the affirmative.

Mr. Robinson: * * * I shall oppose the confirmation of Mr. Bullitt for two reasons: first in order to express my protest and opposition against Russian recognition in any form; * * *

P. 470:

Mr. Robinson: Another reason is that mentioned by the very able Senator from Michigan: the fact that communistic propaganda is widespread in this country, emanating from Moscow; and no matter what promises they may make, Mr. President, the fact remains that they have not kept their word with any country during the past ten years.

The experiences of Great Britain, and of France, and of Italy and of China, and Japan, and of the United States—all are in the same direction. They do

As a matter of fact, even if Federal legislation had approved or ratified this executive arrangement of recognition entered into between our President and Litvinoff, nevertheless we submit that such ratification or approval would be wholly ineffective to destroy or impair the property rights which have already vested and which have been fully recognized by the New York courts. It may be observed in passing that the creditors whose rights were so seriously considered by the New York Court of Appeals, relying upon and acting pursuant to the directions of that Court, after the deed of assignment for the benefit of creditors was filed by the Northern Insurance Company of Moscow in favor of the present defendant, formally lodged their claims with the assignee. A number of these claims, after investigation and submission to the assignee and the referee appointed by the court to pass upon their propriety and merit, were approved in a formal report filed in the New York Supreme Court by the referee. Orders were entered by the Court approving and confirming the report of the referee and directing payment to the creditors by the assignee, and obviously such claims stand on a parity with judgments.

In the present case, not only is the title of the assignee at stake, but the United States Government is attempting

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not keep their word. Indeed within the last year one of their most powerful leaders has made the statement that they reserve the right to repudiate their word whenever it suits them or their interests to do so. "Sign anything", they say, in effect, "in order to get advantages for us, but let it be understood that we will repudiate our word and our signature whenever we see fit to do so."

Pp. 470-1:

Mr. Robinson: Mr. President, that is all I have to say on the subject, I want to make it clear that I am opposed to Russian recognition in any form. While I have no better means of knowing how the people feel about it than any other Senator, it is my opinion that the great majority of the American people are opposed to Russian recognition, that if a vote were to be taken on it throughout the country it would result overwhelmingly against any such recognition. Now that recognition has been accorded, however, by the Chief Executive, it remains for this body to express itself in the only manner it can; that is by a vote on the confirmation of Mr. Bullitt.

to seize a fund, which is subject to decrees directing payment by the courts of the State of New York to certain individual creditors. It would be a violation of public faith to deprive those individuals of their existing rights, which have accrued in the State Court proceedings.

IV.

The Federal Court will not interfere with a proceeding properly pending in a State Court.

A.

In *Pennoyer* v. *Neff*, 95 U. S. 714, 734, the court states: "It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."

By the institution of this action the Government is seeking to promote the rather disturbing spectacle of two courts fighting over the administration of a fund. Fortunately, the courts long ago ruled that the court first acquiring jurisdiction of the *res* continues to administer it. There is now pending an orderly proceeding for the distribution of the Northern's assets to its creditors and stockholders. The Government has been invited to come into this proceeding and file its claim, but it has steadfastly remained aloof, asserting, in effect, that it intends to liquidate this fund according to its own ideas and according to its own judgment as to who or who are not creditors, lienors and claimants. In other words, the pronouncement of the Court of Appeals that the fund is to remain intact in the

State Court for appropriate administration is to be rendered nugatory and ineffective merely because the Government has the belief and idea that a better or a different administration might be conducted and perfected in the Federal Court. If this argument is sustained, it may result and could easily result in repeated clashes of jurisdiction between the State and Federal Courts and the odious result of the two courts at constant odds over which forum was to be used.

The possession of the fund has always been, since the commencement of liquidation, in the State Court which is one of competent jurisdiction. It has been held that under such circumstances such possession will not be disturbed by process out of another court.

Byers v. *McAuley*, 149 U. S. 608;
Covell v. *Heyman*, 111 U. S. 176;
Ellis v. *Davis*, 109 U. S. 485;
Krippendorf v. *Hyde*, 110 U. S. 276;
Borer v. *Chapman*, 119 U. S. 587.

In *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, this Court held that a Federal Court cannot by appointment of a receiver take the property in controversy out of the possession of a receiver appointed by a State Court before the Federal Action is begun and enjoin action on its part where the State Court had jurisdiction of the parties and subject-matter. The Court said:

> "What the Federal Court undertook to do was not to adjudicate rights in personam (Citing cases), but to take the res out of the possession and control of the State Court, and to enjoin all action on its part, except as directed by the Federal Court for Minnesota.
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> * * * * * * *

"Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

In *Palmer* v. *Texas*, 212 U. S. 118, 129, Mr. Justice Day stated:

"We think the law of this court is well established to be that jurisdiction over the property was acquired by the state courts when the receiver was appointed, the judicial process served, and the receiver duly qualified, although the state receiver had not taken actual possession of the property. This principle was recognized in Farmers' Loan & Trust Co. *v.* Lake Street Electric Rwy. Co., 177 U. S. 51, 61, in which this court said:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdictions embrace the same subjects and persons. *Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, to administer trust or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.* The rule has been declared to be of especial importance in its application to Federal and state courts. Peck *v.* Jenness, 7 How. 612; Freeman *v.* Howe, 24 How. 450; Moran *v.* Sturges, 154 U. S. 256;

> Central National Bank *v.* Stevens, 169 U. S. 432; Harkrader *v.* Wadley, 172 U. S. 148."

In the present case the United States is asking for an adjudication of title and of the right to possession of the fund over which the State Court has acquired jurisdiction. It is impossible to conceive how the title of the United States, if it were adjudicated to have one, could be enforced without invading the State Court's jurisdiction over the fund. In some part of the Federal Court proceeding it would become necessary for that Court to seize and exercise dominion over the property. There would then be a conflict between the courts as to which one of them was entitled to possession over the res; for on the one hand the State Court would be seeking to protect the creditors who were armed with legal process and were proceeding against the fund, and on the other hand the Federal Court would be attempting to apply the entire fund in satisfaction of the Government's claim.

In *Matter of Sheldon*, 173 N. Y. 287, the Court of Appeals clarified the nature of an assignment proceeding. It was said:

> "I think in the light of these decisions it must be considered that under the present law *the conversion, disposition and distribution of an assigned estate constitutes from the recording of the assignment a proceeding in court* and that the administration of the estate, though made by the assignee, who, in the first instance at least, is selected by the assignor, is really made by the court under the power granted it by statute to control such administration."

The construction and effect of a state statute regulating assignments for the benefit of creditors is a question on which the decisions of the highest court of the state are controlling in the courts of the United States. *May* v.

Tenney, 148 U. S. 60; *South Branch Lumber Co. v. Ott*, 142 U. S. 622; *Union Nat. Bank of Chicago* v. *Bank of Kansas City*, 136 U. S. 223; *Jencks* v. *Quidnick Co.*, 135 U. S. 457.

In 1914, the New York Legislature defined the status of the proceeding in question here.

Section 20 of the Debtor and Creditor Law provides:

> "Sec. 20. General Powers of Court.—Any proceeding under this article shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this article, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein."

B.

The Federal Court has not exclusive jurisdiction of the matters asserted in the complaint.

In *Ritter* v. *U. S.*, 28 Fed. 2nd 265, the court said:

> "When a sovereign becomes an actor in a Court of Justice, its rights must be determined on those fixed principles of justice which govern between man and man in like circumstances."

Section 24 of the Judicial Code as amended, c-231, 36 stat. 1087, 1091 (U. S. C., Title 28, Sec. 41), speaks of original jurisdiction only. The words quoted do not of themselves and without more exclude the jurisdiction of the State Court. The State Court is only excluded from juris-

diction where a statute expressly grants such jurisdiction to the courts of the United States exclusively.

Section 256 of the Judicial Code, U. S. C., Section 371, sets forth when the United States Courts shall have exclusive jurisdiction as distinguished from original jurisdiction. There is nothing in that section which expressly grants to the federal court exclusive jurisdiction over suits where the United States is a party. In this respect it stands in no better position than a private litigant.

In the case of *Merryweather* v. *United States*, 12 Fed. 2d 407, 409, Circuit Judge Hunt said:

> "While the United States Courts have original jurisdiction of suits at common law or in equity wherein the United States is plaintiff, such jurisdiction is not exclusive. Interpretations of the Constitution settled that point many years ago. In Plaquemines Fruit Co. *v.* Henderson, 170 U. S. 511, it was held that the words 'Judicial power', used in Section 1 of Article III of the Constitution, do not withdraw the States' authority to determine by their courts all cases and controversies to which the judicial power of the United States was extended and of which jurisdiction was not given to the National courts exclusively."

The Government's suit is an action *in rem*. It must be conceded that the original proceeding brought by the Northern Insurance Company in the State Court, the purpose and effect of which was a distribution of the insurance company's assets among its creditors, was a proceeding *in rem*. The Government's claim is also *in rem* for what it seeks is a judgment against the funds of the Northern Insurance Company in control and possession of the Bank.

The relief sought by the United States to obtain a stay of the State Court proceeding is expressly prohibited by Section 265 of the Judicial Code:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The provisions contained in this section cannot be violated even by the United States. (United States *v.* Parkhurst-Davis Co., 176 U. S. 317.)

While it is true that no suit can be brought against the United States without authority of legislative acts, nevertheless, the United States may sue its debtor in any court of law having jurisdiction of the subject-matter. *Cotton* v. *The U. S.*, 11 How. 229; *Merryweather* v. *United States*, 12 Fed. 2d 407.

The United States may intervene in a State Court action and by appearing as claimant in such court, the United States subjects itself to the jurisdiction of such court. *Johnston* v. *Stimmel, et al.*, 89 N. Y. 117, 121; *U. S.* v. *Ansonia Brass Co.*, 218 U. S. 452, and like any other litigant, will be bound by its decision. *Central Trust Co. of New York* v. *Treat*, 192 Fed. 942; *U. S.* v. *Walker*, 148 Fed. 1022. The effect of the final decree which could be entered in the State Court proceeding would not operate as a money judgment against the United States if it filed a claim in that proceeding and the claim was disallowed. Under this test, the United States is not being sued directly or indirectly.

It has never been held when an individual appeals to a higher court from a judgment against him obtained by the United States, that the United States is being sued without its consent. The contention of the government in the present case is just as specious. The cases decided by the government on the question of jurisdiction have no application

to the present case. In *U. S.* v. *Inaba** and *U. S.* v. *McIntosh*, the title to property which the United States owned was being attacked. The United States was defending its own title. In those cases the title was in the United States and that title was being questioned by private litigants. In *U. S.* v. *Babcock* the Government was attempting to remove obstructions to federal instrumentalities. It bears no similarity to the case at bar. In the instant case, the United States merely asserts title and the individual litigants are protecting themselves against the asserted claim. These decisions have not yet received the sanction of the Supreme Court. On the contrary *United States* v. *Parkhurst-Davis* (*supra*) held that Section 265 forbade the injunction. The quotation from *U. S.* v. *Lee* is dicta. In any event, the case has no application, since the decision adjudicated conflicting rights between a state and the United States.

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* The case of *United States* v. *Inaba*, 291 Fed. 416, was criticized and its soundness questioned in 37 Harvard Law Review 387 wherein it was stated:

"This is the first case in which the United States, to protect its property, has encountered the statute prohibiting the federal courts from enjoining proceedings in the state courts. See 1911 U. S. Jud. Code, §265. The situation does not fall within any of the recognized exceptions to the statute. *Traction Co.* v. *Mining Co.*, 196 U. S. 239; *Julian* v. *Central Trust Co.*, 193 U. S. 93; *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214; *Marshal* v. *Holmes*, 141 U. S. 589; *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134. See 36 Harv. L. Rev. 461. The court reasons that the United States could not be forced into the state suit, that a federal officer could not intervene voluntarily in that suit, and, therefore, that the United States would be powerless to protect its property except in the federal court and by enjoining the state action. *Stanley* v. *Schwalby*, 162 U. S. 255. See 1911 U. S. Jud. Code, §262. A statute gives the federal courts jurisdiction over suits for allotments of Indian lands. See 28 Stat. at L. 305 amended in 31 Stat. at L. 760. Interpreting this section, the Supreme Court stated that where title to such land was involved, a state court would be without jurisdiction. See *McKay* v. *Kaylton*, 204 U. S. 458, 469; *Stanley* v. *Schwalby*, *supra*, 270. But the federal district attorney, who prosecutes this suit, derives his power from statutes which do not specifically confine him to the federal courts. See 1878 U. S. Rev. Stat., §771; 33 Stat. at L. 824; 27 Stat. at L. 631. *United States* v. *Boyd*, 68 Fed. 577 (W. D. N. C.); *United States* v. *Winans*, 73 Fed. 72 (D. Wash.). He is not, however, required to attend suits in state courts. Compensation of District Attorney, 16 OP. Atty. Gen. 99. If despite these considerations, the United States could have intervened in the state suit, the major premise of the decision is unproved, and §265 should not have been disregarded. If the federal court was the only one open to the United States the exception seems justifiable, if violating the clear words of a statute may be condoned at all."

Conclusion.

The people of the United States have justly supposed that the policy of protecting property against foreign legislation was fully settled, not by a single decision, but by repeated acts of our courts, performed at frequent intervals.

The court is now called upon to determine whether it should establish a new and doubtful system of policy just proposed, and for the first time presented to its consideration, or whether it shall approve and confirm a long-established system patiently and faithfully built up during a series of years again and again by the New York Courts and other courts of high and revered authority. The parties to the State Court proceeding, in full confidence that the policy was firmly and unchangeably fixed, have accomodated themselves to those rules and proceeded in accordance with them. To proceed to disturb these principles would violate the public faith. The effect of the system which the court is invited to adopt, would lead substantially to foreign domination of American property. The force of the earlier decisions, which covered the actions of the parties in this country, can not now be abated to prevent things in the process of development from reaching their logical conclusion.

There is neither reason nor authority to sustain the contentions of the Government. The decisions of the Courts below are founded on well established precedents.

The decree under review should be affirmed.

Respectfully submitted,

ROBERT J. SYKES,
Solicitor for President and Directors of the Manhattan Company, successor to the Bank of Manhattan Trust Company, Respondent.

ROBERT J. SYKES,
WILLIAM C. MORRIS,
E. W. MCMAHON,
Of Counsel.

FILE COPY

JUL 31 1935

IN THE

Supreme Court of the United States

October Term, 1935

No. 197

UNITED STATES OF AMERICA

Petitioner

v.

LOUIS H. PINK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION IN BEHALF OF RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK AS LIQUIDATOR OF FIRST RUSSIAN INSURANCE CO. ESTABLISHED IN 1827

JOHN M. DOWNES
ALFRED L. GREEN
CLARENCE C. FOWLER
Counsel for Respondent

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BRIEF IN OPPOSITION IN BEHALF OF RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK AS LIQUIDATOR OF FIRST RUSSIAN INSURANCE CO. ESTABLISHED IN 1827

The Opinions Below

No opinion was rendered by the District Court in this case, it having been decided on the authority of the decisions in *United States of America* v. *Bank of New York and Trust Company* and *United States of America* v.

President and Directors of the Manhattan Company, which are sought to be reviewed simultaneously with this case, and which are numbered 195 and 196, respectively. They are reported in 10 Fed. Supp. 269. The opinions of the Circuit Court of Appeals (R. 122-123) have not yet been reported.

Questions Presented

1. Whether title based upon Soviet decrees of confiscation to private property which has always been located in the State of New York and which has never been in the possession or control of any Russian government will be recognized or enforced by our Federal courts, particularly when the highest court of the State has denied extraterritorial effect to such decrees as contrary to its public policy.

2. Whether by the exchange of letters dated November 16, 1933, between the President and the People's Commissar for Foreign Affairs of the Soviet Government (R. 57-61), title to the property involved here was intended to be assigned and, if so, whether it was validly assigned to and accepted by the petitioner.

3. Whether the District Court had jurisdiction of this action, the New York State courts having assumed jurisdiction and actual possession of the funds in controversy long prior to the inception of the instant suit, and the Superintendent of Insurance even now carrying on the liquidation pursuant to directions of the Courts of New York State.

4. Whether the complaint in any aspect sets forth a cause of action in equity against the respondent.

The Decisions Below

The bill of complaint was dismissed by the District Court on the authority of *United States* v. *Bank of New York and Trust Company* and the *United States* v. *President and Directors of the Manhattan Company* on the grounds (1) that the Soviet decrees of confiscation have no extraterritorial effect over property which has always been located here, that said decrees are contrary to the public policy of the United States, and that recognition of the Soviet government "in no way changed the confiscatory nature of the decrees in so far as these particular funds were concerned"; and (2) that no assignment or transfer of the funds in question was ever made to the United States by the Soviet government.

The Circuit Court of Appeals affirmed the orders of the District Court, on the ground that the Federal court had no jurisdiction of the cause of action, the New York State courts having long since assumed jurisdiction and possession of the funds. The opinion of the dissenting judge of the Circuit Court of Appeals expresses the view that by virtue of our recognition of the present Russian Government, the Soviet decrees, admittedly confiscatory in nature, retroactively and extraterritorially vested title in the Soviet Republic over assets always situated in New York. In *Lehigh Valley R. Co.* v. *State of Russia* (21 Fed. [2d] 396, 401; certiorari denied, 275 U. S. 571), the same judge, speaking for the unanimous court, decided directly to the contrary and held that the only acts validated by recognition of Russia were those performed in its own territory.

Statement

On November 14, 1934, the instant suit was commenced. Long prior to that time, however, the Superintendent of Insurance, pursuant to an order of the Supreme Court of the State of New York, New York County, dated August 8, 1925, as resettled by an order dated September 11, 1925, took possession of the assets of the United States Branch of the First Russian Insurance Company, pursuant to Section 63 of the Insurance Law of the State of New York. Pursuant to orders and directions of the said Supreme Court, the Superintendent of Insurance, as liquidator, investigated, ascertained, fixed and determined the claims of policyholders and creditors in the United States and paid such of said claims as were found to be valid (R. 64). A substantial surplus of assets belonging to said company then remained in possession of the liquidator, concerning the disposition of which long, tedious litigation ensued in the courts of the State of New York. Finally, the Court of Appeals of the State of New York, speaking through Chief Judge CARDOZO, by its decision handed down on February 10, 1931, and reported in 255 N. Y. 415, *et seq.*, directed that such surplus funds, after payment of policyholders and creditors of the United States Branch of said company, should be applied by the liquidator to the payment of all valid claims against the First Russian Insurance Company arising from business transacted by the said company *outside of the United States*, and that any surplus then remaining should be then available for foreign attaching creditors, and that any further surplus should then be paid and delivered to the First Russian Insurance Company as rep-

resented by its surviving directors (R. 64). (Italics throughout are ours.) Pursuant to the order of the New York Supreme Court (R. 65, 81-82) entered as directed by the New York Court of Appeals (*supra*) in this proceeding, the liquidator proceeded forthwith to determine the claims of foreign creditors of said company filed with him.

Up to this point the facts in this case are identically the same as those in the *Bank of New York and Trust Company* and *President and Directors of the Manhattan Company* cases. All three companies were being liquidated by the Superintendent of Insurance, pursuant to orders of the Court of Appeals rendered on its decisions in 255 N. Y. 415, *et seq.* In the *Bank of New York* and the *Manhattan Company* cases comparatively few foreign claims were filed with the liquidator, and, after payment thereof, the liquidator, pursuant to the orders of the Court of Appeals, turned over the surplus assets in the case of the Moscow Company to the Bank of New York and Trust Company, as agent or depositary of the Moscow Company and of Paul Lucke, as surviving director and conservator, and in the case of the Northern Insurance Company the liquidator turned over the remaining surplus assets, after payment of the filed foreign claims, to the President and Directors of the Manhattan Company. Thereafter, in those two companies supplementary suits were begun, outside of the liquidation proceedings, in the New York Supreme Court, the object of which was to determine the disposition of such funds. In the *Bank of New York and Trust Company* case (Moscow Company) such supplementary suit had proceeded to judgment prior to the commencement of the suit against it by the petitioner (*R. Bank of New York and Trust Co.* case, 1, 78, 103).

At this point, however, the facts regarding the First Russian Insurance Company differ materially from those in the *Bank of New York* and the *Manhattan Company* cases. In the instant case the liquidator, pursuant to the decision of the New York Court of Appeals (255 N. Y. 415), proceeded forthwith to determine the claims of foreign creditors of said company filed with him, *and certain of said foreign claims were allowed by the liquidator and payments on account thereof as allowed were made in December, 1933, pursuant to orders of the New York Supreme Court* (R. 65). In this respect the petitioner is in error in stating on page 7 of the petition that only domestic claims have been paid in this proceeding. Other foreign claims against the said company were disallowed by the liquidator *and are now being heard before a referee appointed by the New York Supreme Court* (R. 65), who has been hearing many claims, and who has not yet filed his reports. *The liquidator is still conducting the liquidation pursuant to orders of the New York Supreme Court* (R. 65, 81-90, 91-102).

ARGUMENT

POINT I

Public Policy and Retroactive Validity of Soviet Decrees

The bill of complaint affirmatively states that the title of the petitioner is based upon Soviet confiscatory decrees (R. 5, 6). The decrees themselves show their confiscatory nature (R. 41-51) and the opinions of the court below specifically held these decrees to be confiscatory (R. Bank of New York, Trust Co. 168; this R. 128).

During the time when proceedings were being had in the courts of the State of New York in the liquidation of this and other Russian insurance companies, the Court of Appeals of that State authoritatively declared time and again both before and after recognition that the Soviet decrees, admitted by the petitioner to be confiscatory, were contrary to the public policy of the State of New York, shocking to its sense of justice and equity, and would not be enforced. The New York Court of Appeals has further held that the Soviet government acquired no title to any assets in the State of New York of former Russian corporations, such title being based on the identical Soviet decrees through which the petitioner herein relies for its title (*Vladikavkazsky Ry. Co.* v. *New York Trust Co.*, 263 N. Y. 369, 378-379; *James* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 257). In *Vladikavkazsky Ry. Co.* v. *New York Trust Co.* (*supra*), decided after recognition of the Soviet government by the United States, the New York Court of Appeals in no uncertain terms clearly set forth the public policy of the State of New York. That Court said, at pages 378, 379:

> "It is hardly necessary to state *that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts* (citing Baglin *v.* Cusenier, 221 U. S. 580)."

The funds in suit having always been within the State of New York, and the highest court of said state having

declared the admittedly confiscatory decrees of the Soviet government to be against its public policy and unenforceable (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, and *James* v. *Second Russian Ins. Co., supra*), the Federal District Court in New York was under the duty of administering the law as so declared by the highest court of the State of New York. The District Court, therefore, is without power or authority to enforce such Soviet decrees over property and funds within the State of New York (*Clark* v. *Williard*, 294 U. S. 211, 213; *Same* v. *Same*, 292 U. S. 112, 123; *City Bank Co.* v. *Schnader*, 293 U. S. 112, 118-119; *Burnet* v. *Brooks*, 288 U. S. 378, 379; *Pennoyer* v. *Neff*, 95 U. S. 714, 722), where the declared public policy of the State of New York has been to deny the effect of Soviet decrees of confiscation over property located in that State.

The public policy of the United States is equally as emphatic and clear, and likewise the Federal courts will not enforce such decrees over property which has always been located within the jurisdiction of our courts (*Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 491-492; *Fifth Amendment, Constitution of the United States; Baglin* v. *Cusenier*, 221 U. S. 580; *Bank of Augusta* v. *Earle*, 13 Peters 519, 589; *Second Russian Ins. Co.* v. *Miller*, 268 U. S. 552, 560). The alleged acceptance by the President of the assignment heretofore referred to, and the recognition of the Soviet Republic, in no way declared or determined that Soviet decrees of confiscation and appropriation were not against the public policy of the United States (*Geofroy* v. *Riggs*, 133 U. S. 258, 267). The Executive has no authority to confiscate property, and the question of our public policy in such a case is for the courts and not for the Executive to decide. It is true that our

courts will recognize a transfer of title to personal property according to the law of the domicile, and it is also true that the relationship between members of a corporation to the corporation and to each other are controlled by the law of the jurisdiction under which the corporation was created. It is on such general principles that the petitioner relies, citing *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527. But such rules have no application where the transfer at the domicile is by confiscation or by any other method in violation of our public policy. Where extraterritorial effect is given to a transfer of corporate assets it has without exception concerned transfers pursuant to statutes enacted for the purpose of expediting the proper and equitable distribution of assets of the dissolved corporation, policyholders, creditors or any other interested parties (*Relfe* v. *Rundle,* 103 U. S. 222). Assuming that the Soviet Republic therefore became the statutory successor of the Russian corporations which it nationalized, *it could in no event obtain title to assets located in the United States which would be contrary to the law and public policy of the sovereignty in which such assets are located.* (*Clark* v. *Williard, supra.*)

Confiscation of private property being contrary to our public policy and to our public institutions, it follows that the Soviet decrees of confiscation upon which the petitioner relies have no force or validity with reference to private property which has always been located in this country.

It has been conclusively established that the decrees and acts of the Soviet government have no extraterritorial effect and operation within this jurisdiction. This is so whether or not there has been recognition of the government originally claiming title to the property. Recogni-

tion of the Soviet government by the United States gave no retroactive validity to the Soviet decrees of confiscation in the courts of this country, and even if the Soviet government had been recognized from its beginning by our government, such recognition would have given no effect to its decrees issued thereafter.

Lehigh Valley Ry. Co. v. *State of Russia*, 21 Fed. (2d) 396;
Second Russian Ins. Co. v. *Miller, supra;*
Baglin v. *Cusenier, supra;*
Vladikavkazsky Ry. Co. v. *New York Trust Co., supra;*
James v. *Second Russian Ins. Co., supra;*
Frenkel v. *L'Urbaine Ins. Co.*, 251 N. Y. 243.

POINT II

The assignment did not cover these funds. No title to this property has been assigned to and accepted by the petitioner.

We have already shown that the Soviet government, and through it the petitioner, obtained no valid title which our courts will enforce by reason of the decrees of confiscation. The alleged assignment, therefore, contained in the diplomatic letters (R. 57-61) is inoperative (*U. S.* v. *Buford*, 3 Pet. 12, 30). Moreover, an examination of the assignment discloses that it was never the intent to assign the funds or property in suit here. The claims referred to in the letter are intended to mean claims which *preceding Russian governments* might have had because of their transactions in this country, and such claims were par-

ticularly referred to as "due from American nationals, including corporations, companies, partnerships or associations and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims" (R. 58). By its very terms, this purported assignment did not attempt to assign private property situated here. In the same instrument it was agreed that the Soviet government would not make "any claim with respect to judgments rendered or that may be rendered by American courts in so far as they relate to property or rights or interest therein, in which the Soviet government or its nationals may have had or may claim to have an interest; or acts done or settlement made by or with the United States or public officials in the United States or its nationals relating to property, credits or obligations of any government of Russia or nationals thereof" (R. 58).

Thus the very terms of the letter disclaim interference with the fund involved in this case, for in the suit at bar we have the defendant, a public official of the State of New York, administering the fund pursuant to orders and judgments of the New York courts and the laws of that State.

The type of claim undoubtedly intended to be assigned was clearly such a claim as the one involved in *State of Russia* v. *National City Bank*, 69 Fed. (2d) 44, where a former government of Russia had on deposit certain funds with the National City Bank, an American national. It is to such funds which the government may well claim under the assignment, and it is to such funds that the Soviet government, as the successor of prior governments of Russia, acquired title. (See opinion of District Court, *Bank of New York and Trust Company* case [R. 171-172]).

In addition, the title asserted to this property cannot be said to have been accepted through the act of the President. Private property of nationals of the assignor government will always be recognized and protected in the case of diplomatic assignments affecting non-enemy nationals. (*U. S.* v. *Percheman,* 7 Pet. 51, 86-87; *Strother* v. *Lucas,* 12 Pet. 410, 438; *Coffee* v. *Groover,* 123 U. S. 1, 9; *Kinkead* v. *U. S.* 150 U. S. 483).

POINT III

Jurisdiction

The proceedings in the Supreme Court of the State of New York with regard to the funds and assets involved in this suit have been pending since 1925, long prior to the institution of the present suit and the date of the alleged assignment. The possession of this fund by the State Court up to the present time has been continuous and actual since 1925, and, having acquired jurisdiction, its possession cannot be disturbed by process out of another court (*United States Judicial Code,* Title 28, § 379; *Byers* v. *McAuley,* 149 U. S. 608, 614; *Freeman* v. *Howe,* 65 U. S. 450; *Merryweather* v. *U. S.,* 12 Fed. (2d) 407).

The State of New York having acquired jurisdiction and possession of the *res* such possession has been withdrawn from the jurisdiction of all other courts (*Lion Bonding and Surety Co.* v. *Karatz,* 262 U. S. 77). Even where a state court and a federal court have jurisdiction of a matter the court which first acquired jurisdiction retains it until its jurisdiction has been exhausted and its duties discharged in full. (*Peck* v. *Jenness,* 7 How.

624). The New York State Court proceeding, in which the *Superintendent of Insurance was and still is liquidating the affairs of the First Russian Insurance Company,* is unquestionably a proceeding in *rem.* The instant suit is also in *rem,* and under the circumstances the Federal District Court was without any jurisdiction (*Penn. General Casualty Co.* v. *Pennsylvania ex rel. Schnader,* 294 U. S. 189). The federal court, therefore, has no jurisdiction over the *res,* nor can it direct the respondent herein to account (*Waterman* v. *Canal-Louisiana Bank,* 215 U. S. 33, 44-46).

POINT IV

The bill of complaint fails to state a cause of action in equity.

The bill of complaint first alleges that the First Russian Insurance Company was organized under the laws of Russia and authorized to do business in the State of New York, and that it deposited with the Superintendent of Insurance of New York State, in compliance with its laws, the fund in suit here (R. 5). It next alleges that in the latter part of 1917 said insurance company was dissolved by decree of the Russian State and its assets, including this fund (which has always been located here), were confiscated by the said Russian State (R. 5). It is further alleged that on November 16, 1933, the assets here of the insurance company were assigned to it (R. 8), that a demand has been made, that the defendant has refused to pay over on such demand, and that the defendant holds the assets as trustee for the complainant (R. 8, 9).

Clearly, the action sounds only in conversion and though the relief sought does seek an equitable remedy this, nevertheless, does not make the action one in equity when, in fact, it is an action at law.

Moreover, both the alleged assignee and the assignor, the Soviet government, have been guilty of unpardonable laches. The confiscatory decrees were promulgated in 1917 and 1918. For almost sixteen years, up to November 16, 1933, the date of the purported assignment, the Soviet Government took no action with regard to this property. Further, for one year after the date of the alleged assignment, the complainant, the petitioner here, stood idly by and permitted the New York State court and the liquidator to proceed with the disposition of the fund pursuant to orders and judgments of the State court and has allowed and permitted all parties, including creditors, to rely on the State court orders and judgments. As heretofore shown, many foreign claims have been allowed by the liquidator and the claimants have received some payment thereon. Other claims are now being heard by a referee pursuant to orders of the New York State Supreme Court entered prior to the inception of the present suit (R. 65).

The inexcusable laches of the complainant assignee and the assignor while the liquidation proceeding had progressed to such an advanced stage, bars the petitioner from praying for equitable relief.

When, on August 8, 1925, the Superintendent of Insurance took over the First Russian Insurance Company for liquidation, it was taken over for the benefit of its policyholders, creditors, stockholders and the public wherever situated. The New York State Court of Appeals, by its decision in this proceeding, reported in 255 N. Y. 415, *et*

seq., declared that the claims to be paid in the proceeding were not only to be domestic claims, but also claims of any foreign origin. Hundreds of claimants, including citizens of foreign countries other than Russia, filed claims, most of which have been adjudicated by the New York State courts, and some of which have been paid. If the petitioner were to succeed in this action it would necessarily mean that a gross injustice would be done to those claimants whose claims are now before a referee, for they have not yet been paid anything, though they are on an equal footing with those claimants whose claims were allowed and paid prior to the inception of this suit.

Aside from the fact that on a strictly legal basis the petitioner has no claim, the equities do not in the least favor this petitioner.

Conclusion

The principles of law applicable to this litigation and applied by the courts below have long been well settled. The record raises no question of merit deserving of review on certiorari.

WHEREFORE, it is respectfully submitted that the petition should be denied.

JOHN M. DOWNES,
ALFRED L. GREEN,
CLARENCE C. FOWLER,
Counsel for Respondent.

July, 1935.

FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1935

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Petitioner

v.

LOUIS H. PINK

Respondent

MEMORANDUM FOR RESPONDENT IN ANSWER TO "SUPPLEMENT" TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN M. DOWNES
ALFRED L. GREEN
CLARENCE C. FOWLER
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MEMORANDUM FOR RESPONDENT IN ANSWER TO "SUPPLEMENT" TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

On October 7, 1935, simultaneously with the opening of the present session of the Court, petitioner served a "Supplement" to its petition filed on July 8, 1935, which we answered on July 30, 1935. Although counsel for respondent are not aware of any rule or precedent in practice to thus reopen the argument of this application, it is respectfully requested that if that "Supplement" is to be received and considered, the Court accept and consider this memorandum in reply.

We concur and agree with the answering memorandum for the respondent, Bank of New York and Trust Company, and its answer to the "Supplement" to petition for writ of certiorari, and respectfully refer this Court to said memorandum for a complete answer to said "Supplement." We wish, however, to point out briefly to the Court some outstanding errors and omissions in petitioner's "Supplement."

I

The Effect of the Soviet Decrees

Petitioner's "Supplement" states (pp. 3-4) that after the policyholders and domestic creditors had been paid it was the duty of the Superintendent of Insurance, as liquidator, to transmit the surplus funds to the domiciliary liquidator. Not only was there no domiciliary liquidator of the First Russian Insurance Company, but the Court of Appeals, in its decision in 255 N. Y. 415, stated specifically the duties of the Superintendent of Insurance, as liquidator. The Court said (p. 422):

> "In the silence of the statute, a decree instructing the liquidator as to the *administration of the surplus must conform to the exactions of equity and justice.*
>
> "*Holding as we do that the surplus must be made available for the payment of creditors and policyholders with claims founded upon foreign business,* there remains the question of the remedy." (Italics ours throughout.)

The Superintendent of Insurance, as liquidator of the First Russian Insurance Company, has been and still is

carrying out the directions of the Court of Appeals pursuant to said decision. (See also pp. 6, 14-15 of our main brief.)

The Court further said (p. 424):

> "*There is no receiver at the domicile,* and the corporations are still solvent, willing, as well as able, to pay their creditors in full."

The contentions raised by the petitioner (p. 5 of "Supplement") on the question as to whether a nation can be sued without its consent are absolutely not in point and are not involved herein.

We must point out a grave error by petitioner (p. 6 of "Supplement") in asserting that it affirmatively appears in the liquidation proceeding in the State Court that the Soviet Government was a claimant by virtue of its own decrees. The statement is without foundation. The decision of the Court of Appeals (255 N. Y. 415), the opinion of which was written by CARDOZO, *J.*, fails to mention, even by inference, any possible claim of the Soviet Government. The only question involved was the payment of foreign creditors, and the Court held that in this particular instance they should be paid by the New York liquidator.

It is highly significant that petitioners in their supplemental brief, wherein for the first time they argue on the merits the question of the effect of Soviet decrees, have

failed to cite as authority even one case in support of their untenable theories. Our main brief is replete with authority for our views, and petitioner has palpably failed to answer or distinguish any of them.

II

The Scope of the Assignment

In its brief the petitioner has skirted around the main issue concerning the scope of the assignment. The only argument of petitioner is that the assignment should be given a broad interpretation.

But, as broad an interpretation as can be given to any instrument cannot change the simple fact that there were assigned to the United States only amounts due to the Soviet Government as successor of prior Governments of Russia from *American Nationals*. The Soviet Government never has made claim to these funds admittedly not due from or owing by American Nationals, but belonging to the former Russian Insurance Corporations, and such funds could not be and never were assigned. This point is more fully covered in our main brief at pages 10-12.

III

Jurisdiction

Petitioner refers to the case of *Brown* v. *Duffin*, 13 F. (2d) 708, as authority for the proposition that the State Court proceeding is not a bar to the instant suit. That case is absolutely not in point, because its holding

is based on the fact that the first action was *in personam* and, therefore, was no bar to a second action in the Federal Courts. But the Court also held in that case that if the first action in the State Court had been *in rem*, then the State Court would have had exclusive jurisdiction. Here, the first action (the present liquidation proceeding of the First Russian Insurance Company) is unquestionably *in rem* (Record, *United States* v. *George S. Van Schaick*, fols. 208-239) and even under the ruling in *Brown* v. *Duffin* the State Court has exclusive jurisdiction.

Though this point has been fully covered in respondent Bank of New York & Trust Company's answering brief (pp. 3-4) and to which we respectfully refer this Court, we desire to particularly emphasize that the liquidation proceeding of the First Russian Insurance Company is still in progress, and that said proceeding is strictly one *in rem*.

There is no conflict between the decision below and the case of *Brown* v. *Duffin, supra*.

The petition should be denied.

Respectfully submitted,

JOHN M. DOWNES,
ALFRED L. GREEN,
CLARENCE C. FOWLER,
Counsel for Respondent.

October 11, 1935.

FILE COPY

No. 197

DEC 10

IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA,
Petitioner

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the domesticated United States Branch of FIRST RUSSIAN INSURANCE COMPANY, Established in 1827,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, RESPONDENT

JOHN M. DOWNES
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IN THE

Supreme Court of the United States

October Term, 1935

No. 197

UNITED STATES OF AMERICA, *Petitioner*,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the domesticated United States Branch of FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, RESPONDENT

The Opinions Below

No opinion was rendered by the District Court in this case, it having been decided on the authority of the deci-

sions in *United States of America* v. *Bank of New York and Trust Company* and *United States of America* v. *President and Directors of The Manhattan Company*, which cases are to be reviewed simultaneously with this case, and are numbered 195 and 196, respectively. They are reported in 10 Fed. Supp. 269. The opinion of the Circuit Court of Appeals is reported in 77 Fed. (2d) 880.[1]

Statement

By an order of the Supreme Court of the State of New York, New York County, dated August 8, 1925, as resettled by an order dated September 11, 1925,[2] and pursuant to Section 63 of the Insurance Law of the State of New York,[3] the Superintendent of Insurance took possession of the assets of the United States Branch of said company and, pursuant to orders and directions of the said Supreme Court, the said Superintendent of Insurance, as liquidator, investigated, ascertained, fixed and determined the claims of policyholders and creditors in the United States of the said company and paid such of said claims as were found to be valid. A substantial surplus of assets belonging to said company then remained in possession of the liquidator, concerning the disposition of which long litigation ensued in the courts of the State of New York. Finally, the Court of Appeals of the State of New York, by its decision, reported in 255 N. Y. 415, directed that such surplus funds, after payment of policyholders and creditors of the United States Branch of said company, should be

[1] The Circuit Court of Appeals affirmed the order of the District Court on the authority of *United States* v. *Bank of New York and Trust Company*, which opinion is reported in 77 Fed. (2d) 866.

[2] Record, pages 32-37.

[3] Set out in Appendix at pages 59-62.

applied by the liquidator to the liquidation of all valid claims filed with him against the First Russian Insurance Company arising from business transacted by the said company *outside of the United States.*[4] An order of the New York Supreme Court upon the remittitur of the New York Court of Appeals, making the order and judgment of the Court of Appeals the order and judgment of the New York Supreme Court, was entered on June 16, 1931 (R. 37-42).

Up to this point the facts in this case are identically the same as those in the *Bank of New York and Trust Company* and *President and Directors of the Manhattan Company* cases. All three companies were being liquidated by the Superintendent of Insurance, pursuant to orders entered upon the decisions of the Court of Appeals in 255 N. Y. 415, *et seq.* In the Moscow Fire Insurance Company and the Northern Insurance Company of Moscow liquidations, comparatively few foreign claims had been filed with the liquidator, and, after payment thereof, the liquidator, pursuant to the decisions of the Court of Appeals, turned over the surplus assets in the case of the Moscow Company to the Bank of New York and Trust Company, as agent or depositary of the Moscow Company and of Paul Lucke, as surviving director and conservator, and in the case of the Northern Insurance Company, the liquidator turned over the remaining surplus assets, after payment of the filed foreign claims, to the President and Directors of the Manhattan Company, as agent or depositary. Thereafter, in those two companies, proceedings were taken in the New York Supreme Court to determine the disposition of such funds. In the *Bank of New York and Trust Company* case (Moscow Company) such suit

[4] Italics are ours throughout the brief unless otherwise noted.

had proceeded to judgment prior to the commencement of the suit against it by the petitioner (R. *Bank of New York and Trust Co.* 45, 49).

At this point, however, the facts regarding the First Russian Insurance Company differ materially from those in the *Bank of New York* (Moscow Fire) and the *Manhattan Company* (Northern Insurance Company of Moscow) cases. In the instant case the liquidator, pursuant to the decision of the New York Court of Appeals (255 N. Y. 415), proceeded forthwith to detemine the large number of claims of foreign creditors of said company filed with him. *Certain of said foreign claims were approved and allowed by the liquidator and payments on account thereof as allowed were made in December, 1933, after recognition of the present Russian government by the United States of America, and pursuant to orders of the New York Supreme Court* (R. 65). Other foreign claims against the said company were disallowed by the liquidator *and are now being heard before a referee appointed by the New York Supreme Court* (R. 65), who has been hearing many objections to the liquidator's recommendations and disallowances, but who has not yet filed his reports. Two claims of American citizens have been reduced to judgments (R. 4-5) affirmed by the New York Court of Appeals after recognition (*Matter of People—First Russian Ins. Co., Claims of Campbell, et al., and Imchanitzky*, 266 N. Y. 421). Payment of such judgments is prevented by the injunction herein (R. 31-32). The instant suit by the United States Government was commenced on November 14, 1934, long after the orders above referred to were made by the New York Supreme Court. *The liquidator is still conducting the liquidation proceeding pursuant to orders of the New York Supreme Court* (R. 32-50).

Questions Presented

1. Whether title based upon Soviet decrees of confiscation, to private property which has always been located in the State of New York and which has never been in the possession or control of any Russian government will be recognized or enforced by our federal courts, particularly when the highest court of the state has denied extraterritorial effect to such decrees as contrary to its public policy.

2. Whether by the exchange of letters dated November 16, 1933, between the President and the People's Commissar for Foreign Affairs of the Soviet government (R. 27-29), title to the property involved here was intended to be assigned, and, if so, whether it was validly assigned to and accepted by the petitioner.

3. Whether the federal courts have jurisdiction of this action, the New York State courts having assumed jurisdiction and actual possession of the funds in controversy long prior to the inception of the instant suit, and the Superintendent of Insurance even now carrying on the liquidation pursuant to directions of the courts of New York State.

Summary of Respondent Liquidator's Argument

The bill of complaint admits that the petitioner's claim is based upon Soviet confiscatory decrees (R. 4). Such confiscatory decrees might operate within the jurisdiction

of the Soviet government, but, because such decrees are contrary to our public policy, our courts will not recognize or give extraterritorial validity or effect to them so as to vest title to the fund either in the Soviet government or its assignee. The funds in suit have always been within the State of New York, and the highest court of said state has declared that the admittedly confiscatory decrees of the Soviet government are against its public policy and unenforceable here.

The nature of the confiscatory decrees and the effect given them in this forum was not changed through recognition of the Soviet government. The retroactiveness of laws or decrees of recognized nations, if they are confiscatory, does not refer to acts sought to be given extraterritorial effect.

The acceptance by the petitioner of the alleged assignment is not conclusive or determinative of the question of public policy. The executive may only determine the political policy of our government and our courts are not precluded from judicially determining the effect of these decrees where private property is concerned.

The assignment did not cover the fund in suit and no title to it was assigned to or accepted by the petitioner. The assignor, not having acquired title, its assignee, the petitioner in the case at bar, acquired none. Moreover, the language of the assignment itself indicates that it was never intended to assign this fund.

The federal court has no jurisdiction of the suit, because the state court, long prior to the inception of the instant suit, acquired jurisdiction and possession of the *res*. The Superintendent of Insurance, as liquidator, pursuant to Section 63 of the Insurance Law, and pursuant to orders of the New York State courts, has, since 1925,

retained jurisdiction and possession of the property in accordance with the decisions of the Court of Appeals of the State of New York. The state court having once acquired jurisdiction and possession of the *res* may deal with it as it pleases in order that justice and equity may prevail.

ARGUMENT

POINT I

The petitioner admits that its claim is founded upon an assignment of title acquired by confiscation. Our courts will not recognize or enforce such a title based upon Soviet decrees of confiscation over the property in question here. Such decrees are in violation of our established national and state public policy.

The bill of complaint affirmatively states that the petitioner's claim is based upon Soviet confiscatory decrees (R. 4). The decrees themselves show their confiscatory nature (R. 19-25). Though it is affirmatively claimed that the title of the Soviet government alleged to have been assigned to the complainant is based upon such confiscatory decrees, it is nevertheless asserted by the petitioner that such decrees establish the right of the Soviet government to the fund in suit and, consequently, make out valid title in the petitioner, to property which has always been within the State of New York, and has been and is being administered by the courts of New York since 1925.

These confiscatory decrees might operate within the territorial jurisdiction of the Soviet government, where that government had the power and control to exercise its jurisdiction and authority, but, because their confiscatory character and nature are so contrary and repugnant to our public policy, our courts will not recognize or give such extraterritorial validity to said decrees so as to vest title to the fund in suit either in the Soviet government or its assignee. **These assets are and were at all times private property, were never within the possession or control of any Russian government, have always been in this country, and could not be extraterritorially affected by those decrees.**

The petitioner, as the alleged assignee of the Soviet government, upon a claim asserted to exist in the Soviet government based upon confiscatory decrees, sues here in a non-governmental capacity and has no greater rights than the Soviet government itself would have if such assignment had not been executed. The alleged transfer of any alleged claim of the Soviet government against these funds to the United States cannot give to the claim any greater validity than it possessed in the hands of the assignor (*U. S.* v. *Buford*, 3 Peters 12, 30). The Soviet government did not acquire such a title as would be enforced by our courts if the Soviet government itself were the plaintiff in the instant suit instead of the present petitioner.

The legislation of any country has no extraterritorial effect or force as a matter of right. *Second Russian Insurance Co.* v. *Miller*, 297 Fed. 404, 408-409, C. C. A. 2d Circ. (citing *Rose* v. *Himely*, 4 Cranch 41, MARSHALL, *C.J.*), affirmed 268 U. S. 552.

The Apollon, 9 Wheat. 362, STORY, *J.*;
Hilton v. *Guyot*, 159 U. S. 113.

The extent to which the law of one nation is recognized, and allowed to operate within the domain of another nation, depends upon so-called comity (*Second Russian Ins. Co.* v. *Miller, supra,* p. 409, citing *Bank of Augusta* v. *Earle,* 13 Peters 519, 589). But, when comity conflicts or is not in accord with the public policy of the nation or state where such foreign law is sought to be given effect, it must give way and yield to public policy. In *Bank of Augusta* v. *Earle, supra,* this Court said:

> "It (comity) is the voluntary act of the nation by which it is offered and is inadmissible when contrary to its policy or prejudicial to its interests."

In a recent decision of the New York Court of Appeals (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust,* 263 N. Y. 369, 378, Feb. 27, 1934), it is said:

> "The principle which determines whether we shall give effect to foreign legislation is that of public policy (citing cases). *Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail* (citing authority). We give or deny the effect of law to decrees or acts of a foreign governmental establishment in accordance with our own public policy" (*Russian Reinsurance Co.* v. *Stoddard,* 240 N. Y. 149, 163).

The question naturally arises, what is public policy, and further, what is our public policy in relation to the foreign law sought to be enforced here? The term, "public policy," in itself, is vague and susceptible of many different interpretations, but it is universally agreed that confiscation of private property is so shocking and offensive to our conception of morals and justice that it comes

within the rule of private international law concerning the exception of public order or policy. That exception is, that a state having jurisdiction will not enforce foreign legislation contrary to the fundamental concepts of law of the state having such jurisdiction. The exception of this rule of private international law is in harmony with our statement that the confiscatory decrees in question can only operate within the territorial jurisdiction of the Soviet government. The exception to the rule is applicable when the enforcement of the foreign legislation would be against the moral and social conceptions of the state having jurisdiction.

Many countries have incorporated this exception of public order or policy in their own civil codes.

Civil Code of Italy,
Argentine Republic,
Code Napoleon (*France*),
Greece,
Congress of Montevideo (Art. 4 of Protocol),
Acts of the Second Hague Conference for the Unification of Private International Law (Art. 11).

The exception of public policy is operative in American law when the enforcement of the foreign law or decree contravenes an important public policy of the state of the forum, and where it contravenes the canon or morality established by civilized society (*Manor, Conflict of Laws,* pp. 9, *et seq.*). It is contrary to the public policy of this forum to aid in carrying out a wholesale dissolution and confiscation of assets of corporations *outside* of Russia, and our courts have extended the exception of public order so as to refuse effect to such decrees both in respect to dissolution and confiscation.

A. Our public policy is opposed to the Soviet decrees of confiscation.

During the time when proceedings were being had in the courts of the State of New York in the liquidation of this and other Russian insurance companies,[5] the Court of Appeals of that State authoritatively declared time and again, both before and after recognition of Soviet Russia, that the Soviet decrees admitted by the petitioner to be confiscatory, were contrary to the public policy of the State of New York, shocking to its sense of justice and equity, and not enforceable in that state. The New York Court of Appeals has further held that the Soviet government acquired no title to any assets in the State of New York of former Russian corporations, such title being based on identical Soviet decrees through which the appellant herein relies for its title (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust,* 263 N. Y. 369, 378-379; *James* v. *Second Russian Ins. Co.,* 239 N. Y. 248, 257).

The funds in suit have always been within the State of New York, and the highest court of said state has declared that the admittedly confiscatory decrees of the Soviet government are against its public policy and unenforceable here. In *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co., supra,* decided after recognition of the Soviet government by the United States, the New York Court of Appeals, in no uncertain terms, clearly set forth the public policy of the State of New York. That court said, at pages 378-379:

> *"It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its*

[5] The First Russian Insurance Company is still being liquidated by the Superintendent of Insurance of the State of New York under supervision of the court (R. 29-50).

assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts (*Baglin* v. *Cusenier,* 221 U. S. 580).

"We enforce the same principle even in regard to statutes of sister States (*Barth* v. *Backus,* 140 N. Y. 230, 239)."

The federal court, therefore, is without power or authority to enforce such Soviet decrees over property and funds within the State of New York, where the declared public policy of the State of New York has been to deny the effect of Soviet decrees of confiscation over property located in that state (*Clark* v. *Williard,* 294 U. S. 211, 213; *City Bank Co.* v. *Schnader,* 293 U. S. 112, 118-119; *Burnet* v. *Brooks,* 288 U. S. 378, 379; *Pennoyer* v. *Neff,* 95 U. S. 714, 722).

In *Cooper* v. *Newell* (1899), 173 U. S. 555, the court said (p. 566):

"A domestic judgment is the judgment of a domestic court, and a domestic court is a court of a particular country or sovereignty. Undoubtedly the judgments of courts of the United States are domestic judgments of the Nation, while in the particular State in which rendered they are entitled to be regarded as on the same plane in many senses as judgments of the State; and so the judgments of the courts of the several States are not to be treated by each other or by the courts of the United States as in every sense foreign judgments. But the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independ-

> ent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several States as between each other. *And the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.*"

The public policy of the United States is no different from that of the State of New York, and the federal courts likewise will not enforce such decrees over property which has always been located within the jurisdiction of our courts.

In *Russian Volunteer Fleet* v. *United States* (282 U. S. 481, 491-492), the Court, by HUGHES, *Ch.J.*, said:

> "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. *The provision that private property shall not be taken for public use establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments.*"

See also:

> *Loucks* v. *Standard Oil,* 244 N. Y. 99;
> *State of Colorado* v. *Harbeck,* 232 N. Y. 71;
> *Marshall* v. *Sherman,* 148 N. Y. 9;
> *Barth* v. *Backus,* 140 N. Y. 230.

The principle here invoked was well settled in the Federal courts long prior to the time when any question first arose with reference to the force and validity in this country of the Soviet decrees of confiscation.

In *Baglin* v. *Cusenier Co.* (221 U. S. 580), this Court considered the effect in this country of the French law of July 1, 1901, known as the Association Act, which dissolved the Congregation of the Chartreux and confiscated its property. The question arose, among others, whether such French law had any effect upon the trade-marks previously registered in the United States by such Congregation and used in connection with the business of the monks of the Congregation transacted in this country. Mr. Justice HUGHES, in deciding this question in the negative, said, at page 596:

> "The French law cannot be conceived to have any extra-territorial effect to detach the trade marks in this country from the products of the monks, which they are still manufacturing."

The same question had previously arisen in the British House of Lords (*Lecouturier* v. *Rey* [1910], A. C. 262), and Mr. Justice HUGHES quoted with approval from the opinion of Lord MACNAGHTEN in that case as follows:

> "To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislation to prevent the monks from availing themselves in England of the benefit of the reputation which the liquers of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market."

As tersely expressed by Chief Justice MARSHALL in *The Antelope* (10 Wheat. 667, 123), "The courts of no country execute the penal laws of another." The word "penal" as used in the maxim of Chief Justice MARSHALL includes

any extraordinary pecuniary liability imposed by law by way of punishment (*Huntington* v. *Attrill*, 146 U. S. 657, 667), and applies to all suits in favor of the state for the recovery of pecuniary penalties (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 290). *A fortiori*, the principle applies to out and out decrees of confiscation. Indeed, quite apart from the point that the Soviet decrees are penal or confiscatory, it is well established that an assignment by operation of law as distinguished from a voluntary assignment "has no legal operation out of the state in which the law was passed" (*Cole* v. *Cunningham*, 133 U. S. 107, 129; *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S. 624, 629).

And so it has been held in this District that the courts of one state or country will not execute or enforce the revenue or penal laws of another state or country (*Moore* v. *Mitchell*, 30 D. [2d] 600, affirming judgment below, 28 F. [2d] 997).

The argument on this point may be emphasized with the following quotation from the opinion of Mr. Justice GRAY in the case of *Hilton* v. *Guyot* (159 U. S. 113, 163-164):

> "No law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has often been criticized, no satisfactory substitute has been suggested.

> "'Comity' in the legal sense is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws."

Confiscation of private property is contrary to our public policy and to our public institutions, and it follows that this Court must declare that the Soviet decrees of confiscation upon which the complainant United States relies have no force or validity with reference to private property which has always been located in this country.

From the foregoing it will be seen that the Soviet government has no title to this property which our courts will enforce. Our federal courts have consistently followed that rule.

Kennett v. *Chambers,* 14 How. 39, 146 Ed. 316;
U. S. v. *Trumbull* (D. C.), 48 Fed. 99;
Agency of Canadian Car Co. v. *American Can Co.* (C. C. A.), 258 Fed. 363, A. L. R. 1182;
Baglin v. *Cusenier, supra;*
Lehigh Valley Ry. Co. v. *State of Russia,* 21 Fed. (2d) 396.

B. Recognition gave no retroactive validity to these confiscatory decrees in our courts.

The nature of the confiscatory decrees and the effect they will be given in this forum was not changed through recognition of the Soviet government. Recognition of the

Soviet government by the United States gave no retroactive validity to the Soviet decrees of confiscation in the courts of this country, and even if the Soviet government had been recognized from its beginning by our government, such recognition would have given no effect to its decrees issued thereafter.

Lehigh Valley Ry. Co. v. *State of Russia,* 21 Fed. (2d) 396;
Second Russian Ins. Co. v. *Miller, supra;*
Baglin v. *Cusenier, supra;*
Vladikavkazsky Ry. Co. v. *New York Trust Co., supra;*
James v. *Second Russian Ins. Co., supra;*
Frenkel v. *L'Urbaine Ins. Co.,* 251 N. Y. 243.

In *Lehigh Valley Ry. Co.* v. *State of Russia, supra,* the court said, at page 401:

> "* * * It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition. Acts theretofore performed outside of its own territory cannot be validated by its recognition."

In *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co., supra,* the court said, at pages 378 and 379:

> "* * * *That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts.* (*Baglin* v. *Cusenier,* 221 U. S. 580.)
>
> "We enforce the same principle even in regard to statutes of sister States. (*Barth* v. *Backus,* 140 N. Y. 230, 239.)

"The fact that the present Russian government was not recognized was not the basis of our refusal to give effect to its decrees nationalizing corporations and confiscating their property. During the period when those decisions were made, we recognized and enforced 'mere ordinary legislation' relating to 'every day transactions of business or domestic life.' (*Petrogradsky M. K. Bank* v. *National City Bank; supra; Matter of People* [*First Russian Ins. Co.*], 255 N. Y. 428, 432.)

"*Prior to recognition we clearly intimated that our decision would have been the same if at the time recognition had been granted.* (*James & Co.* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 257.)

"*The general statement contained in the opinion in Salimoff & Co.* v. *Standard Oil Co.* (262 N. Y. 220) *to the effect that recognition of a de facto government as a de jure government is retroactive in effect and validates all the acts of the government so recognized from the commencement of its existence, must be read in connection with its context and as so read it did not refer to acts sought to be given effect extraterritorially.*"

The same rule has been followed by our courts since the earliest days of our government. The same rule is also followed in all civilized countries.

The English courts have clearly stated and followed this rule in litigations based on decrees or legislation of the Soviet government. In *The Jupiter*, 96 L. J. P. 62 (1927), a ship formerly belonging to a nationalized Russian corporation was libelled. The ship having been sold by the Soviet government, the libellant maintained that no title was conveyed by the Soviet government, since the ship in question was outside of Soviet territory and not within Soviet jurisdiction when the corporate owner was national-

ized. Both the lower court and the Court of Appeals denied extraterritorial effect to the Soviet decree of nationalization, and in the latter court Lord Justice BANKS said (p. 250):

> "The decree had no operation to transfer any property except property within the jurisdiction of the Soviet Republic."

In *Employers Liability* v. *Sedgwick Collins* (1926), 1 K. B. L., affirmed on appeal to the House of Lords, 1927, A. C. § 95, speaking of these Soviet confiscatory decrees, the court said:

> "Effective as such legislation may be within the limits of Russian territory, *it cannot determine the ownership of property locally situate in this country.*"

It was held to the same effect in *Russian Bank for Foreign Trade* (1933), Ch. 745, also in *Russian Commercial Bank* v. *Comptoir D'Escompte de Mulhouse* (1925), A. C. 112.

The same rule has been followed by the courts of France. See—

Etat Russe v. *Compagnie Ropit* (1925), 52 Clunet, Journal de Droit International 391 (Trib. Comm. Marseille); (1926) 53 Clunet 667, 668 (Cour d'Aix); (1928) 55 Clunet 674 (Cour de Cassation);

Rosa Catana v. *Potocki,* Tribunal de Seine (1875), 2 Clunet 20;

Le duc de Cambridge v. *Le duc de Brunswick,* Cour Royale (1836), Sirey II, 70, 178;

also in

Cockerill v. *La Union et Phenix Espagnol,* Cour d'appel de Paris (Ire. Ch.), 23 Decembre, 1930, where the court said:

"The French courts will not give effect in France to the legislative acts of a foreign corporation *even though recognized* when they are contrary to French public policy *and will not give any effect to those decrees which in opposition to the principle contained in Article 545 of the Civil Code, pronounces the pure and simple confiscation of private property.*

"From which it follows that the Soviet decrees cannot invest the Russian State with the rights which the Russian Transport Company possessed in France."

See also—

Cie Nord de Moscou v. *Phenix Espagnol,* Cour d'appel de Paris (McNair, 1927-1928, No. 42, p. 66).

The courts of other countries have decided to the same effect.

In Germany, see——

Ginsberg v. *Deutsche Bank,* Kammergericht, Berlin (1925), 63 Decisions of Reichsgericht, p. 18; 93 Decisions of Reichsgericht, p. 183.

In Switzerland, see—

Wilbuschewitch v. *Zurich, Tribunal Federal* (1926) 53 Clunet 1110, 1113.

In Denmark, see——

Council of Russian Orthodox Community in Copenhagen v. *Legation of R. S. F. S. R.*, Supreme Court of Denmark (1925-1926), Annual Digest of International Law Cases 24.

See also the following texts:

Habicht, "The application of Soviet Laws and the exception of public order," 21 American Journal of International Law 238;

Borchard, "Unrecognized governments in American Courts," 26 American Journal of International Law 261;

Nebolsine, "Nationalized Russian Corporations, 39 Yale Law Journal 1130; "Confiscatory Decrees of Foreign Governments," 73 Solicitor's Journal (1928), Parts 1 and 2;

"Interpretation of the Confiscatory Phases of the Mexican Constitution of 1917" (R. B. Gaithor), 56 American Law Review, pp. 39-55;

"Confiscation of Private Property of Foreigners under Color of a Changed Constitution," by Ira Jewell William, 5 American Bar Association Journal 152 to 162.

Thus, it has been conclusively established that the decrees and acts of the Soviet government have been uniformly and universally denied extraterritorial effect and operation, and cannot have the effect of transferring to the Soviet government title or ownership to property not

situated within its jurisdiction. This is so whether or not there has been recognition of the government claiming title to the property. This rule has been followed and applied by this Court and the Circuit Court of Appeals for the Second Circuit in the cases of *Second Russian Ins. Co.* v. *Miller, supra,* affirming 297 Fed. 404, 409, and *Baglin* v. *Cusenier, supra,* and by the New York Court of Appeals in *Vladikavkazsky Ry. Co.* v. *New York Trust Co., supra, Frenkel* v. *L'Urbaine Ins. Co., supra,* and *James & Co.* v. *Second Russian Ins. Co., supra.*

Recognition of the Soviet government by the United States gave no retroactive validity to these confiscatory decrees in the courts of this country, and even if the Soviet government had been recognized from its beginning by our government, such recognition would have given no effect to its decrees issued thereafter. Belated recognition has no greater effect.

The rule followed by our courts and by the courts of other nations is plainly shown by the foregoing. Even the Soviet government itself recognizes that such decrees have no extraterritorial effect and has issued official declarations so stating. If the rule in this jurisdiction were not so plain, those declarations of the Russian government would be conclusive. The declarations referred to, in which the Soviet government expressly recognized the lack of extraterrtorial effect in its confiscatory decrees and expressly limited and confined their operation to the limits of Soviet territory and excluded their application to assets outside of Russia, are printed in the record on appeal to this Court in the suit of the *United States of America* v. *The President and Directors of the Manhattan Company,* &c., No. 196, decided in the District Court and Circuit Court of Appeals simultaneously with the instant

suit and to be argued in this court with the appeal in the case at bar. We refer to circular of the People's Commissariat for Foreign Affairs, No. 42, dated April 12, 1922, and the circular of the Commissariat for Justice, No. 194, dated September 26, 1923, which are printed at pages 41-42 of the record on appeal in the suit against The Bank of Manhattan Trust Company.

C. The acceptance by the petitioner of the alleged assignment is neither conclusive nor determinative of the question of public policy.

It has been urged by the petitioner that, regardless of universal opinion and regardless of what our courts may say, the public policy involved here is determined by the sovereign, and that the acceptance of the alleged assignment by the sovereign has conclusively determined that our public policy is not violated by giving effect to the confiscatory decrees over private property in the United States. The latter contention is unquestionably contrary to the Fifth Amendment to the Constitution of the United States. While the executive may determine the political policy of our government, it is our Constitution, legislation and decisions of our courts which determine our public policy. The complainant's contention is unquestionably without foundation and contrary to the principles and policy of our government.

Geofry v. *Riggs*, 133 U. S. 258, 267;
License Tax Cases, 5 Wall. 462;
United States v. *Trans-Missouri Freight Association*, 166 U. S. 299;
St. Louis Min. Co. v. *Montana Min. Co.*, 171 U. S. 650;

Hartford Fire Insurance Co. v. *Chicago, Milwaukee & St. Paul R. R. Co.*, 70 Fed. Rep. 201;
Logan & Bryan v. *Postal Telegraph Co.*, 157 Fed. Rep. 570.

In *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul R. R. Co., supra,* the court said:

> "The public policy of a state or nation must be determined by its constitution, laws, and judicial decisions, not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public." Citing *Vidal* v. *Philadelphia,* 43 U. S. (2 How.) 127; *United States* v. *Trans-Missouri Freight Association,* 58 Fed. 58; *Swann* v. *Swann,* 21 Fed. Rep. 299.

Our courts have always held that where international agreements or undertakings affect the rights of private parties, our courts have the authority to act in construing and interpreting the agreements.

Foster and Elam v. *Neilson,* 2 Pet. 253;
Russian Reinsurance Co. v. *Stoddard,* 240 N. Y. 149;
United States v. *Arredondo,* 6 Pet. 691;
United States v. *Rauscher,* 119 U. S. 417;
Head Money Cases, 112 U. S. 580.

The United States Government, by the very institution of this suit, has submitted itself to the jurisdiction of the court, and thereby seeks an interpretation of the assignment and the terms thereof. Whether it may claim this fund depends in part upon such interpretation.

In *Ritter* v. *United States,* 28 Fed. (2d) 265, Circuit Court of Appeals (Third Circuit), the court said:

> "When a sovereign becomes an actor in a court of justice, *its rights must be determined upon those fixed principles of justice which govern between man and man in like situations.*" Citing *Walker* v. *United States,* 139 Fed. 409; *Cooke* v. *United States,* 91 U. S. 389; *United States* v. *Flint,* 25 Fed. Cases 1107 (No. 15121).

In *Strother* v. *Lucas,* 12 Pet. 410, 438, the court said:

> "No construction of a treaty, which would impair that security to private property, which the laws and usages of nationals would without express stipulation have conferred, would seem to be admissible further than its positive words require."

The District Court's ruling on said point was as follows:[6]

> "The suggestion of the Government that the Litvinov assignment is not open to judicial construction requires little comment, for clearly where private rights are concerned, the mere assertion of the Government that suit should be commenced does not preclude the courts from determining as a judicial matter the true meaning of the instrument involved."

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[6] Record, *Bank of N. Y. & Trust Co.* (83).

POINT II

The assignment did not cover this fund. No title to this property has been assigned to and accepted by the petitioner.

The District Court properly ruled that no assignment or transfer of the fund was ever made to the United States by the Soviet government (R. *Bank of New York and Trust Co.* 82). The Circuit Court of Appeals assumed for the purpose of argument, but did not decide that the assignment was sufficient to transfer whatever right to an accounting the assignor had (R. *Bank of New York and Trust Co.* 91).

It is a cardinal principle of contract law that an assignee can only obtain by assignment that which the assignor had. The Soviet government having no valid title by reason of the decrees of confiscation which our courts will enforce, its assignee, the petitioner, obtained no greater rights. The alleged assignment contained in the diplomatic letters (R. 57-61) is therefore inoperative (*United States* v. *Buford, supra*).

Moreover, an examination of the assignment and the language used therein makes it evident that it was never the intent to assign the funds or property in suit here. The assignment states that:

> "The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the

Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment" (R. 27).

The Soviet government also agreed (R. 27-28) not to make any claim with respect to:

(a) "judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

The claims referred to in that letter are clearly intended to mean claims which *preceding Russian governments* might have had because of their transactions in this country, and such claims were particularly referred to as

"due from American nationals, including corporations, companies, partnerships or associations and also the claim against the United States Russian Volunteer Fleet, now in litigation in the United States Court of Claims." By its very terms, this purported assignment did not attempt to assign private property situated here, unless it was due from an American national to the Soviet government's predecessor. The funds in suit are not and never were due from an American national to any government of Russia.

Again, the Soviet government, in the same instrument, agreed, preparatory to final settlement of the claims and counterclaims between the United States and the Soviet government, that it would not make "any claim with respect to judgments rendered or that may be rendered by American courts in so far as they relate to property or rights or interests therein, in which the Soviet government or its nationals may have had or may claim to have an interest; or acts done or settlements made by or with the United States or public officials in the United States or its nationals relating to property, credits or obligations of any government of Russia or nationals thereof."

In the suit at bar, we have the defendant, a public official of the State of New York, who is administering the fund pursuant to orders and judgments of the New York courts (R. 32-50) and the laws of that state. Thus, the very terms of Mr. Litvinoff's letter disclaim interference with the fund and the situation here, assuming, but not conceding, the fund or situation might have been affected by omission of the exception.

At no time has any Russian government asserted or attempted to assert claim to the funds in question here. It has never been contended until now that any such funds

were due or found to be due to any government of Russia, or to the Soviet government as successor to any former Russian government. There are, therefore, no such amounts which Mr. Litvinoff's letter purports to "release and assign to the government of the United States." The President's reply to Mr. Litvinoff's letter did not go beyond an acknowledgment and repetition of the letter and assignment, so that by its very terms the entire correspondence negatives any intent to convey any right in the funds involved here. The Soviet government had no rights and asserted no rights in the funds which it could convey, since they were private funds, were never within the jurisdiction of the Soviet government, and were at no time the property of that government or any prior government of Russia.

The type of claim intended to be assigned was clearly a claim such as the one involved in State of *Russia* v. *National City Bank* (21 Fed. [2d] 396), where a *former government* of Russia had on deposit certain funds with the National City Bank, an American national. It is such funds which the government might claim under the assignment, and it is to such funds that the Soviet government, as the successor to prior governments of Russia, might have acquired title.

It cannot be assumed, and in any event not without a clear and explicit expression to such effect, that this general assignment of governmental claims carries with it the private claims of nationals, nor will our courts assume that the United States accepted a governmental assignment of any private claims of nationals in the absence of the right of such government to so assign. The funds here are in possession of the Superintendent of Insurance of the State of New York, who is bound to

distribute such funds to the persons to whom they have been awarded by decisions of our courts. They are private persons whose rights in the funds are predicated upon private transactions to which the Russian government was not a party. Therefore, the Litvinoff assignment does not and cannot transfer any title or interest in the funds in question here.

In view of the fact that the assignment is so clear as to its intent and purpose, the petitioner, seeking to circumvent its obvious inapplicability here, argues that by the institution of the present suit the interpretation given by it is conclusive, and that the interpretation by the assignor is the same. Nowhere in the record is there the slightest indication of the Soviet government having acquiesced in the institution of this suit. Even if it did, it would not make the slightest difference. On the other hand, if the petitioner should be successful in this suit, it would have to account to the Soviet government for any amount collected (R. 58). It is indeed difficult to suppose that the Soviet government in such a situation would refuse to accept the benefit of funds which it never owned and which were never due it or its predecessor government.

The argument in effect is the same as that propounded by the petitioner on the question of public policy where it is asserted that the public policy in this case is governed by the executive. We have shown that the argument is untenable and without foundation (pp. 23-25).

The petitioner in this suit, asserting its rights as an assignee of the Soviet government, is an ordinary party litigant divested of sovereignty, and, in asserting its rights to this property, comes into court as does any other suitor (*Kandle* v. *U. S.*, 4 Fed. [2d] 183; *U. S.* v. *Shelby Iron Co.*, 4 Fed. [2d] 829, 833).

In *O'Brien* v. *U. S.*, 51 Fed. (2d) 674, the court said, at page 677:

> "Although it be sovereign it should not be permitted to adopt means which are condemned by the courts when practiced by its citizens. It may not be sued save with its consent, it is true, but if it comes into court, it is as a litigant."

In any event, our courts will not recognize the transfer or assignment by a foreign government of any property other than that which belongs to it and will not uphold an assignment by a government of private property to which the government did not have title (*U. S.* v. *Percheman*, 7 Pet. 51, 86-87, by MARSHALL, *C.J.*; *Strother* v. *Lucas*, 12 Pet. 410, 438; *Coffee* v. *Grooves*, 123 U. S. 1, 9; *Kincaid* v. *U. S.*, 150 U. S. 483).

POINT III

The federal court is without power to interfere with the administration of the funds in suit here because such administration is being conducted in duly authorized proceedings pending in the Supreme Court of the State of New York. The latter court having acquired prior jurisdiction and possession of the *res*, will not be disturbed by the federal courts.

The court below affirmed the order of the District Court dismissing the bill of complaint on the ground that the District Court did not have jurisdiction, the state

court having first acquired jurisdiction in *rem*. This point, we submit, was correctly decided.

The proceedings in the Supreme Court of the State of New York with regard to the funds and assets involved in this suit were pending since 1925, long prior to the institution of the present suit and the dates of the alleged assignments[7] pressed by the complainant herein. The state court is in possession of the assets, and, having acquired jurisdiction, its possession cannot be disturbed by process out of another court:

> *United States Judicial Code*, Title 28, Section 379;
> *Byers against McAuley*, 149 U. S. 608, at 614;
> *Ellis against Davis*, 109 U. S. 485;
> *Krippendorf against Hyde*, 110 U. S. 276;
> *Covell against Heyman*, 111 U. S. 176;
> *Borer against Chapman*, 119 U. S. 587;
> *Freeman against Howe*, 65 U. S. 450;
> *Merryweather against U. S.*, 12 Fed. (2d) 407.

The possession of this fund by the state court up to the present time has been continuous and actual since 1925, long before any steps whatever were taken in the federal court and for more than eight years prior to recognition of the Soviet government. The jurisdiction of the state court over the subject-matter of this suit since 1925, having been and now being in the state court, it has been withdrawn from the jurisdiction of all other courts (*Lion Bonding & Surety Company* v. *Karatz*, 262 U. S. 77).

The New York Court of Appeals in the *Matter of People* v. *First Russian Insurance Company*, 255 N. Y.

[7] The assignment is dated November 16, 1933. The instant suit was begun November 14, 1934.

415, directed that, after payment of policyholders and creditors of the United States Branch of the First Russian Insurance Company, the surplus funds then remaining should be applied by the liquidator to the liquidation of all valid foreign claims against the First Russian Insurance Company arising from business transacted by said company outside of the United States. The administration of the fund pursuant to that de ion of the Court of Appeals in 1931 has been and is being carried on by the liquidator in the proceeding in the state court. It cannot be denied that the state court has had jurisdiction over this fund since 1925.

In this connection, the opinion of Mr. Justice BREWER, in the case of *Byers* v. *McAuley*, 149 U. S. 608, shows the principle followed by the federal courts. Mr. Justice BREWER said, at page 641:

> "First, it is a rule of general application, that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 400 (9: 470); *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15: 1028); *Peck* v. *Jenness*, 48 U. S. 7 How. 612, 625 (12: 841, 846); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Ellis* v. *Davis*, 109 U. S. 485-498 (27: 1006-1010); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28: 145); *Covell* v. *Heyman*, 111 U. S. 176 (38: 390); *Borer* v. *Chapman*, 119 U. S. 587, 600 (30: 532, 537). • • • and, vice versa, the same principle protects the possession of the property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States, excepting, of course, those

> cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States * * *."

This principle has been reiterated in *Lion Bonding & Surety Company* v. *Karatz*, 262 U. S. 77, in which Mr. Justice BRANDEIS said:

> "Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts, *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38, 54. Compare *Oklahoma* v. *Texas*, 258 U. S. 574, 581. Possession of the *res* disables other courts of coordinate jurisdiction from exercising any power over it. *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U. S. 51, 61. *The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto.* It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction. *Palmer* v. *Texas*, 212 U. S. 118, 126, 129."

It is respectfully submitted that this suit cannot be maintained, in view of the principles and rules repeatedly laid down by this Court, that where a state court and a federal court have jurisdiction of a matter, the court which first acquired jurisdiction retains it until its jurisdiction has been exhausted and its duties discharged in full. As was stated in *Peck* v. *Jenness*, 7 How. 624:

> "It is a doctrine of law too long established to require citation of authorities, that, *where a court has jurisdiction, it has a right to decide every ques-*

> *tion which occurs in the cause,* and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * * Neither can one take the property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

To the same effect, see also:

> *Freeman* v. *Howe,* 24 How. 450;
> *Buck* v. *Colbath,* 3 Wall. 334;
> *Harkrader* v. *Wadley,* 172 U. S. 148;
> *Prout* v. *Starr,* 188 U. S. 537.

The court below, in deciding the question of jurisdiction, said:

> "* * * Rather extensive liquidation proceedings have been conducted in the New York Courts which it will now serve no good purpose to relate in detail. *The important matter is that before this action was commenced the fund in controversy had been taken into the custody of the New York Court and has ever since remained in its custody. The sole purpose of the proceeding in the New York Court was to liquidate the fund and distribute it according to its laws. To that end, the state suit was in rem."*

It must be remembered that, unlike the *Bank of Manhattan* and *Bank of New York* cases, the liquidator here, pursuant to the authority vested in him by the New York courts, is still in possession of the *res,* has never relin-

quished it, and is today administering the fund in accordance with the laws of New York State, in a strictly *rem* proceeding. The state court, therefore, cannot be deprived of its jurisdiction over the *res* (*Covell* v. *Heyman*, 111 U. S. 176; *Harkin* v. *Brundage*, 276 U. S. 36; *Lion Bonding & Surety Co.* v. *Karatz, supra; Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U. S. 51).

It is claimed, however, that though the state court acquired custody and control of the property by virtue of the liquidation proceedings, that the court's authority ended when domestic creditors were paid (p. 78). The Superintendent of Insurance, as liquidator, however, in taking over the company pursuant to Section 63 of the Insurance Law, did so not only for the benefit of local creditors, but for the benefit of policyholders, creditors and stockholders wherever they may be. In *Matter of People* (*City Equitable Fire Ins. Co.*), 238 N. Y. 147, the Court of Appeals of the State of New York interpreted and construed Section 63 of the Insurance Law. The court said, at pages 155, 156, 157:

> "If so an inspection of section 63 of the Insurance Law under which the proceeding was taken indicates the intent of the Legislature. That section provides that in certain cases the Superintendent may apply to the Supreme Court for an order directing the corporation to show cause why he should not take possession of its property and conserve its assets for the benefit of its creditors and for such other relief as the nature of the case and the interests of its policyholders, *creditors, stockholders or the public may require. The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders*

in this state or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose. The section proceeds that if the court directs the Superintendent to take possession of the property and conserve the assets of the corporation his rights and duties with reference to the corporation and its assets shall be those heretofore exercised by and imposed upon ancillary receivers of foreign corporations in this State."

"* * * Not content with this statement, however, the Legislature gives a further indication of its purpose. Primarily the Superintendent takes possession of the assets for a specific object. But secondarily in the interest of the general policyholders, creditors and stockholders." * * *

"* * * *We have the right to assume that the English courts will act equitably.* If local creditors or policyholders in whose interest the Superintendent acts had not been paid in full; *if there was danger that in a foreign jurisdiction they would not receive fair treatment as to any balance that might be due them, we might transmit any funds not applicable to the preferential payment of their claims, under conditions designed to protect their interests or make such other disposition of them as we thought wise.* * * *"

The Court of Appeals, in the liquidation proceeding in this case, after domestic creditors had been paid, declared that the liquidator continue in possession in order that foreign claims might be paid by him (*Matter of People, First Russian, supra*). In view of that pronouncement by the Court of Appeals, made in 1931, there can be no question but that the State of New York and the liquidator since 1925 to date have obtained and kept continuous jurisdiction and possession of the *res.*

POINT IV

Refutation of Petitioner's Argument

It is intended, under this Point, not only to categorically answer and refute petitioner's argument, but at the same time to supplement and amplify respondent's argument with regard to the same points.

I

(a) It is argued that the funds herein involved, having belonged to a Russian corporation, the sovereign had the power to destroy said corporation and appropriate and confiscate its assets. It is quite true that a government enjoys control over corporations created by it, and that its power includes the right to dissolve any such corporation and to appoint a liquidator vested with title to the corporate property, but, in every instance where extra-territorial effect has been given to such legislation, it has concerned transfers pursuant to statutes enacted for the purpose of expediting the proper and equitable distribution of assets of the dissolved corporation to policyholders, creditors or any other interested parties.

Relfe v. *Rundle,* 103 U. S. 222;
Clark v. *Williard,* 292 U. S. 112;
Martyne v. *American Fire Union Ins. Co.,* 216 N. Y. 183;
Cogliano v. *Ferguson,* 245 Mass. 264;
Bockover v. *Life Assn. of America,* 77 Va. 85.

Such rules have no application where the transfer at the domicile is by confiscation or any other method in vio-

lation of our public policy. Obviously, the confiscatory decrees of the Soviet government involved herein provide a clear distinction from the cases cited in appellant's brief, particularly *Canada Southern Railway Co.* v. *Gebhard*, 109 U. S. 527. We have demonstrated under Point I of this brief that under well-defined and recognized principles of international law, extraterritorial effect will be denied confiscatory decrees, and it is submitted that this Court should follow that rule and deny the effect of the confiscatory decrees sought to be given here, which is so repugnant and shocking to the public policy of this country.

Under the same Point, it is further argued by the petitioner that the Soviet decree of confiscation provided for a liquidating commission and that the latter took title to the assets in this country. Further, that the funds in suit were deposited solely for the benefit and security of domestic policyholders and creditors and that upon completion of payment to them the funds should have been turned over to the so-called liquidating commission.

If the Russian government was the statutory successor or liquidator (which it was not), even then it would have to submit to the laws of the place where the property is located, and those laws are to the effect that the decrees of the Soviet government, confiscatory as they admittedly are, will not be given such effect as to destroy property rights to the fund actually in the possession of the State of New York. What is more, the New York State Court of Appeals, after domestic creditors were fully paid, expressly declared that foreign claimants should be paid in this proceeding (*Matter of People* [*First Russian Ins. Co.*], 255 N. Y. 415). The court there said, page 423:

"* * * The creditors so proving were acting in response to a published invitation, published in accordance with the order of liquidation, to submit claims of every kind without reference to the place of origin, and were stayed in the meantime from a remedy in the courts. *There would be manifest inequity if at this late day an ancillary receiver were to remit them to their legal remedies and thus compel them to prove anew* (cf. *Sands* v. *Greely & Co.*, 88 Fed. Rep. 130, 133; *Culver Lumber & Mfg. Co.* v. *Culver*, 81 Ark. 102; and see 44 Harvard Law Review, pp. 437-442, collating the decisions). *A court of equity, when once it has assumed control over a fund, may grant relief that 'would otherwise be beyond the scope of its authority'* (*McGean* v. *Metropolitan Elevated Ry. Co.*, 133 N. Y. 9, 17), *if justice so requires.*"

Where it is apparent that the foreign liquidator or statutory successor would not preserve the rights of creditors, the courts of the United States may properly refuse to turn over such funds and may resort to the fundamental doctrine that American law determines title to assets situated here. In *Clark* v. *Williard, supra,* Justice CARDOZO, in speaking of the rights of the statutory successor of an Iowa corporation in respect of corporate assets located in Montana, said:

"In respect of his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. *He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession.*"

In *Matter of People* (*First Russian Ins. Co.*), *supra*, which involved the funds in suit here, the court said, at page 424:

> "• • • Distribution must then be made in submission to the principle that equality is equity (*Matter of People* [*City Equitable Fire Ins. Co.*], *supra*). Conditions are different in the case before us. *There is no receiver at the domicile*, and the corporations are still solvent, willing, as well as able, to pay their creditors in full."

In other words, the highest court of the State of New York has held that the Superintendent of Insurance should not remit funds to a "foreign liquidator," either where it appears that there is no foreign liquidator, as in this case, or where it is obvious that the foreign liquidator will not deal justly with such funds.

In deciding this point in the District Court, the court said:

> "It is insisted on behalf of the United States that the Soviet Government became the 'liquidator' of the assets of the two dissolved Russian Insurance companies, and that a liquidator's title will be accorded recognition in our courts. The difficulty with this contention is that the complaints allege specifically that the properties of the two companies were 'confiscated and appropriated' by the Soviet Government. However, it is perfectly clear that the liquidation of a corporation implies winding up and distributon of the assets among the creditors and stockholders; *Lafayette Trust Co.* v. *Boggs*, 213 N. Y. 260, 263; *Matter of Silkman*, 121 A. D. 202; • • •"

It has always been the policy of the State of New York to protect the interests of creditors and shareholders even

as against a domiciliary liquidator. In *Martyne* v. *American Union Fire Ins. Co., supra,* the title of the statutory liquidator of a dissolved Pennsylvania Insurance Company was recognized as to New York assets because it was a title in trust for creditors and was in harmony with the New York law. The Court expressly stated that the title of foreign statutory assignees is recognized and enforced only "where it can be without injustice." Likewise, in *Matter of People* (*City Equitable Fire Insurance Company*), 238 N. Y. 147, 157, and *Matter of People* (*Norske Lloyd Insurance Company*), 242 N. Y. 148, 165, *et seq.*, the New York Court of Appeals pointed out that under the provisions of the Insurance Law of the state, funds of a foreign insurance company deposited with the Superintendent of Insurance are held not only for the primary benefit of local creditors, but secondarily for the benefit of all the creditors and stockholders of the company wherever they may be and that surplus funds will be turned over to a foreign liquidator only where it appears that such foreign liquidator will deal justly and fairly with such surplus funds.

It is clear then that not only is it well settled that the Soviet government could acquire no title to New York assets by the decrees relied on by petitioner, and that such decrees are contrary to the public policies of the state and the nation, but that the disposition of the New York assets must be in accordance with the law of the State of New York, and that, under the circumstances, New York having possession of the property, could do with it what it pleased, to the end that justice and equity might prevail (*Clark* v. *Williard, supra; Matter of People* (*First Russian*), *supra; Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130).

(b) It is a misstatement of the law to state without qualification that recognition validates all decrees of the country recognized, from the commencement of its existence, and that it therefore follows that such decrees must be given effect in our courts. We have already shown under Point I, pages 10-16, that recognition retroactively validates only the effect of those decrees *in* Russia, and, secondly, that recognition in and of itself does not operate so as to automatically require our courts to give effect to such decrees. If they contravene our established public policy, or if they are contrary to any of our fundamental rules of justice and equity, our courts will not permit that they be given effect here.

The case of *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (1933 App. Cases, 289), relied upon by the petitioner, merely held that the *Banque Industrielle de Moscou,* a Russian bank, was not in existence in October, 1930. The Court did not construe Soviet decrees of confiscation or adjudicate the effect of such decrees upon property in England, but, in a later case it was held that notwithstanding the Soviet decrees of dissolution of Russian banks, the English branch of a Russian bank could be wound up under the provisions of the English Companies' Act, equivalent to our liquidation law. *In re Russian Bank for Foreign Trade* (133 Chancery Division 745), the Court said:

> "the decrees, as is admitted by both experts, were of a confiscatory character (p. 763) * * *. If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course

recoverable (citing authorities). The decrees in question could not according to our laws have the effect of extinguishing the debt if locally situate here, or of transferring it to the Soviet Republic; (p. 767) * * *. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here (p. 768); * * * Of course if I am right in thinking that the nationalization decrees have no extra-territorial operation, the R. S. F. S. R. have no claim to any of the property which is involved, and as I have pointed out this seems to be their own view" (p. 770).

(c) It is asserted by the petitioner that the Russian decrees of confiscation are not opposed to the public policy of the United States because the law to be invoked is the law of Russia and because local public policy may not be invoked to subject to the jurisdiction of a local court the property of a foreign sovereign.

1. The petitioner disclaims any attempt to give extra-territorial effect to the Soviet decrees on the theory that the title to these funds depends upon the law of Russia. It is admitted by the petitoner that under the rule in conflict of laws no state can make a law which by its own force is operative in another state, but it is claimed that the rights and interests in this state depend upon the law of Russia because it is said the petitioner has acquired its title by virtue of Soviet decrees.

It is true that in Russia, Russian property or property rights can be dealt with as the sovereign sees fit, by confiscation or otherwise, and we have never disputed this rule, but to go further and say without qualification that

the rule applies to property outside of the domain of the sovereign is challenged by us. The petitioner has no authority for such contention. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, and *Ricaud* v. *American Metal Co.*, 246 U. S. 304, hold no more than that the acts of foreign sovereigns upon property or rights in their own territories will not be disturbed by our courts.

Moreover, as we have already shown, this Court, as well as others, has held that a state court has full dominion over a fund such as this and that title to the property or fund depends upon where it is located. The property in suit has always been in the State of New York and the State of New York has ruled that the fund must be distributed to those having valid claims against it (*Matter of People* [*First Russian*], *supra*). The title to particular assets is determined by the law of the situs, and New York law applies in determining the procedure and control of the distribution of New York assets among creditors.

2. It is stated by the petitioner that local public policy may not be invoked to subject to the jurisdiction of a local court the property of a foreign sovereign. The statement itself is founded on a false premise because it assumes in the first instance that under our laws the property in suit belongs to the foreign sovereign, Soviet Russia. We have shown that this property never belonged to that sovereign and that title to it never passed to the petitioner. But, it is said that a defense given by the law of a foreign jurisdiction may not be thwarted because of the public policy of the forum (citing *Bradford Elec. Co.* v. *Clapper*, 286 U. S. 145). The argument is unsound, particularly as applied here. There is a distinction to be made betwen the use of Soviet decres as the basis for

maintaining an action and their use as defenses to an action. Public policy may deny to a plaintiff a right to enforce a cause of action based on such decrees, but, indeed, this is a far cry from asserting the decrees as a defense.

This distinction was pointed out in *Luther* v. *Sager* [1921] 3 K. B. 532, where the Court said, at page 549:

> "Some reliance was placed by the respondents upon the principle enunciated in such cases as *Kaufman* v. *Gerson* ([1904], 1 K. B. 591), that the Courts of this country will not enforce a contract invalid by our law as being in contravention of some essential principle of justice or morality, notwithstanding that by the law of the country where it was made no objection could be raised to it. In my opinion this principle has no application. The appellants are not seeking to enforce such a contract. They are resisting an endeavor on the part of the respondents to induce the Court to ignore and override legislative and executive acts of the Government of Russia and its agents effecting the title to property in that country; it is that which, in my opinion, we are not at liberty to do."

Public policy will refuse to permit the petitioner to use the confiscatory Soviet decrees as a sword.

It is further argued by petitioner under this Point that the executive branch of this government determines and has determined the public policy of the United States in this case. It is submitted that such contention is untenable (*ante*, pp. 23-25). The Executive may determine the political policy of the nation, but he cannot determine its public policy, particularly in a juridical sense, where the issue is the determination of private property and rights (*Hartford Fire Ins. Co.* v. *Chicago, Milwaukee & St. Paul R. R. Co., supra*).

The Executive cannot confiscate private property. The delegation of power to the Executive upon subjects and matters of foreign relations such as neutrality questions (*U. S.* v. *Palmer*, 3 Wheat. 610), boundary questions (*Foster* v. *Neilson*, 2 Pet. 253, 307-309), and sovereignty over a particular territory (*Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420), does not include the power or authority to determine the public policy to be given effect by our courts in a purely juridical matter concerning the effect of foreign legislation upon property in this country.

(d) It is argued by the petitioner that the property here involved, which has always been in this country, was legally situated in Russia and that the Soviet government thereby acquired such a title to it as will be recognized by our courts. The argument states, in effect, that the fund here, consisting of cash and securities, is an intangible, and under the doctrine of *mobilia sequuntur personam* had its situs in Russia, the domicile of the Russian corporation. The suggestion thus made is contrary to the decisions of this Court.

In *De Ganay* v. *Lederer*, 250 U. S. 376, this Court held that stocks, bonds, etc., may have a situs in the place where the paper is found, just like other tangible properties. The Court said in that case, at pages 381-382:

> * * * "Are they property within the United States? It is insisted that the maxim, 'Mobilia sequuntur personam,' applies in this instance, and that the situs of the property was at the domicil of the owner in France. *But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds, and mort-*

gages may acquire a situs at a place other than the domicil of the owner, and be there reached by the taxing authority."

It has been repeatedly held that a State has the same jurisdiction over bank deposits as it has over tangible property within its borders and this is so although the deposit is with a local branch of a foreign bank or insurance company (*Rex* v. *Lovitt* [1912], A. C. 212, 218, 219; *Richardson* v. *Richardson* [1927], 43 T. L. R. 631, 633).

In *Security Savings Bank* v. *California,* 263 U. S. 282, it was held by this Court that the State of California has full dominion over deposits in a California savings bank, even though the depositors or their heirs or legal representative may reside elsewhere.

The funds in the instant case have always had their situs in this state and are completely localized here. It is submitted that under the doctrine of the *Security Savings Bank* case, it is clear that the State of New York has dominion over the funds and has the right to determine the title to these funds just as it would have jurisdiction over the properties within its borders if they were tangibles. The cases cited by petitioner in connection with its argument that the funds have a legal situs in Russia have therefore no application.

The petitioner completely overlooks the fact that not only has the fund always been within the jurisdiction of the State of New York, but, in accordance with Section 27 of the Insurance Law, the fund when deposited here was held by the Superintendent of Insurance as trustee. Legal title to this fund, therefore, was never in any one else but the Superintendent of Insurance.

The weakness of petitioner's argument in this respect is apparent for it is stated that the property here "might" originally have had a situs here by virtue of Section 27 of the Insurance Law but that its situs was transferred in some unexplained manner to Russia when domestic claims were paid. The fallacy in this argument lies in the fact that New York never lost control or jurisdiction of this fund. Upon completion of payment of purely local creditors, the Court directed that the fund remain here for the purpose of paying all other creditors, and stated that the purpose in assuming and retaining jurisdiction and control was for the benefit of policyholders and creditors everywhere (*Matter of People, First Russian, supra*). This was in accordance with the expressed policy of the State of New York to afford protection to creditors and policyholders, even as against a domiciliary liquidator, when it was felt that justice and equity could not otherwise be done (*Matter of People, City Equitable, supra; Matter of People, Norske Llyod, supra*).

The same rule was applied by this Court in *Clark* v. *Williard, supra,* as we have already pointed out, where it was held that even a domiciliary liquidator must submit to the mandate of the sovereignty that has the physical control of the property.

(e) It is also claimed by the petitioner that the rights herein asserted on behalf of adverse claimants also had a situs in Russia and were governed by Russian law.

The argument assumes that the controversy now before the Court is between the rightful owner of property and a creditor asserting against the property, or that it is a controversy between two parties to a contract where the rights of one party depend upon the law where the contract was to be performed. No such situation is be-

fore the Court. The respondent herein, the Superintendent of Insurance, as liquidator, holds the fund for specific purposes, pursuant to orders and directions of the New York courts. In carrying out those instructions problems may arise as to contract rights of certain creditors who claim against the fund held by him, but in the instant case the United States is claiming by virtue of Soviet confiscatory decrees a paramount right of title to the fund held by the Superintendent of Insurance of the State of New York as liquidator. There is nothing herein in the nature of a contract between the petitioner and respondent which must be determined by Russian law. *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, is not to the contrary and that case has no application because the problem there before the Court was that of contract rights made in Russia, performable in Russia and as expressly provided in the contracts under consideration in that case to be governed by Russian law. The Court gave no extraterritorial effect to the confiscatory decrees.

In any event, the assertion by petitioner that Soviet decrees resulted in extinguishment of liabilities everywhere (p. 45) is not the law. In *James* v. *Second Russian Insurance Co.*, 239 N. Y. 248, the Court of Appeals said, at page 257:

> "• • • *As to the Soviet decree, we think its attempted extinguishment of liabilities is brutum fulmem, in England as well as here, and this whether the government attempting it has been recognized or not.* Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. *Its fiat to that effect could not constrain the courts of other sovereignties, if*

assets of the debtor were available for seizure in the jurisdiction of the forum (*Barth* v. *Backus*, 140 N. Y. 230; *Matter of People* [*City Equitable Fire Ins. Co.*], 238 N. Y. 147, 152; cf. *Matter of Barnett's Trusts*, 1902, 1 Ch. 847)."

"* * * Neither comity nor public policy requires us to enforce a mandate of confiscation at the behest of such a government to the prejudice either of our own citizens or of those of any friendly power seeking justice in our courts."

II

Under this Point it is argued by the petitioner that the funds held by the respondent were transferred to the petitioner by the Litvinoff assignment; that the language of the assignment covered the funds; and that the interpretation adoped by the sovereign should control. We believe that we have fully answered the first portion of this argument under our Point II, pages 26-31.

In further answering the contention of the petitioner, we may say that indications point to the fact that even the Soviet government is not in accord with the United States as to the interpretation to be placed upon the assignment. The petitioner asserts that the claim of the Russian volunteer Fleet against the United States was specifically mentioned in the assignment because it was a direct claim against the United States and because the Russian Volunteer Fleet is the instrumentality of the Soviet government. If that be so, and it must be remembered that this assertion is made by the United States, the petitioner, then it seems clear that the Soviet differs with the United States as to the interpretation to be placed on the assignment, because, in a suit now pending

in the United States Court of Claims (*Russian Volunteer Fleet* v. *United States*), the plaintiff, Russian Volunteer Fleet, the so-called instrumentality of the Soviet government, disputes the effect and interpretation to be given said assignment, and is continuing its suit against the United States.

III

It is argued by the petitioner that the Court below was in error in holding that the federal court could not oust the state court of the prior jurisdiction and control of the *res* obtained by it.

(a) Section 24 (1) of the Judicial Code does not do more than confer original jurisdiction upon the District Courts to entertain suits brought by the United States. It does not give to the District Courts exclusive jurisdiction or enable that court to interfere with the prior jurisdiction of a state court having possession of and dealing with a *res*.

Section 265 of the Judicial Code provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In *Merryweather* v. *United States*, 12 Fed. (2d) 407, the Court said, at pages 409-410:

> "While the United States courts have original jurisdiction of suits at common law or in equity wherein the United States is plaintiff, such jurisdiction is not exclusive. Interpretations of the

> Constitution settled that point many years ago. In *Plaquemines Fruit Co.* v. *Henderson,* 170 U. S. 511, 18 S. Ct. 685, 42 L. Ed. 1126, it was held that the words, 'judicial power,' used in Section 1 of article 3 of the Constitution, do not withdraw from the states authority to determine by their courts all cases and controversies to which the judicial power of the United States was extended and of which jurisdiction was not given to the national courts exclusively. 'Nothing more,' said the court, 'was done by the Constitution than to extend the judicial power of the United States to specified cases and controveries, leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies or should only exercise jurisdiction concurrent with the courts of the several states.' *Robb* v. *Connolly,* 11 U. S. 624, 636, 4 S. Ct. 544, 28 L. Ed. 542; Foster's Fed. Prac. vol. 1, p. 27."

In *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, this Court, in referring to a court which had first acquired jurisdiction, said:

> "• • • Hence, it alone can rightfully assert control over the property and proceed with litigation which affects that control, *Palmer* v. *Texas,* supra, 129, 130; *Wabash R. Co.* v. *Adelbert College,* supra, 54, and it alone can determine how far it will permit any other court to interfere. *People's Bank* v. *Calhoun,* 102 U. S. 256, 262; see *Riggs* v. *Johnson Co.,* 6 Wall. 166 • • •"

(b) It is also contended by the petitioner that the rule of priority is, in any event, not applicable because the New York State court proceeding is not in *rem* and because the present suit is also not in *rem.* The former con-

tention is not strenuously urged in this suit against the liquidator because it cannot seriously be doubted that the proceeding in the state court, which was commenced in 1925, was a strictly *rem* proceeding. The possession of the property at that time by the Superintendent of Insurance, as liquidator, under the New York statute[8] was equivalent to *custodia legis*. The liquidator is an ancillary receiver of the property of a foreign corporation.[9] (*Matter of People* (*Russian Re Co.*), 255 N. Y. 415, 423, 424; *Matter of People* (*City Equitable Fire Ins. Co.*), 238 N. Y. 147, 156).

In *Jacoby* v. *Bond and Mortgage Co.*, 72 Fed. (2d), 420, and *Tolfree* v. *New York Title and Mortgage Co.*, 72 Fed. (2d) 702, the Court said in each case:

> "By virtue of the order and Article 11 of the Insurance Law the Superintendent became in effect a receiver under the supervision of the state court and the property under his control became in *custodia legis.*" (Citing cases.)
>
> "In such circumstances, under established rules of law, the federal courts should not interfere with the possession of the state court." (Citing cases.)

It is claimed, however, by the petitioner that if the state court did have jurisdiction, it was lost when local creditors were paid. But, while the Superintendent of Insurance as liquidator, by order of the court held possession and jurisdiction of the *res*, and before recognition, the New York state court ruled that such possession should be maintained and continued for the specific pur-

---

[8] Former Section 63 of the Insurance Law, now Article 11 thereof.

[9] Section 63, subdivisions 4 and 5, New York Insurance Law, now Article 11, § 400-428.

pose of paying foreign claims. (*Matter of People, First Russian, supra*). That possession and jurisdiction has never been relinquished by the courts of the State of New York, and nothing, not even subsequent recognition of the Soviet government, could oust the state court of possession and jurisdiction of the property within its control. (*Sands* v. *E. S. Greeley, supra.*)

The petitioner also contends that the present suit is not in *rem* but in *personam*. That contention is also disputed. The court below held that *if* the state court proceeding were in *personam* (and it was held to the contrary), only then could another action in another jurisdiction, also in *personam*, be had. But the court held further that the present suit was not in *personam*, saying:

> "Nor is there any question here of the personal liability of the defendant apart from what may attach solely from the fact that a fund in custody of the State court to which the plaintiff makes claim has been placed in its possession under the order of the State court."[10]

The present suit brought by the petitioner, although in form one for an accounting, is in fact not such a suit for it asserts a claim to the whole fund in possession and control of the state court and does not seek personal liability against the liquidator. The case of *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, strongly relied upon by petitioner, is not, therefore, in point, and, as the court below correctly said, "there being no such personal liability there is no room for the application of the rule expressed in *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33."

[10] This was said in connection with the *Bank of New York* and *Bank of Manhattan Co.* cases, but it applies even more strongly to the instant case where the liquidator still holds the fund pursuant to court order.

So, also, the case of *Brown* v. *Duffin,* 13 Fed. (2d) 708, has no application here. The holding in that case was predicated on the fact that the proceeding first brought was in *personam* and therefore was no bar to a second action in the federal courts. We submit that it is plain that the liquidation proceeding, which has not been completed, is a *rem* proceeding, and the *Brown* case is not in point. Moreover, the case of *Waterman* v. *Canal-Louisiana Bank, supra,* holds that a suit for an accounting in a federal court, if brought subsequent to a suit in *rem* in the state court, irrespective of the prayer for an accounting, cannot be maintained. It is further submitted that even under the *Brown* case the federal court has no jurisdiction because the court below held in that case that if the first action had been in *rem,* as in the case at bar, then the state court would have had exclusive jurisdiction.

(c) The petitioner contends that even if the federal courts have no exclusive jurisdiction, and even if the New York state court proceeding is in *rem,* nevertheless the rule of priority is not applicable because the property was sovereign property, and because after local claims were paid jurisdiction was forever lost.

It is respectfully submitted, first, that it has been conclusively shown that the Soviet government never at any time, whether before recognition or after, could obtain title by virtue of its confiscatory decrees over the property, which has always been situated within the State of New York; and, secondly, that New York, under its inherent power to deal with the fund under its jurisdiction and control, never lost jurisdiction after payment of local creditors, but, on the contrary, retained such jurisdiction for the express purpose of paying foreign claims, and that said proceeding for the purposes indicated, is

today still being maintained by the liquidator in the New York courts. The statement that the nationalized corporation could not institute a proceeding sufficient to give the court any jurisdiction, in *rem* or otherwise, is untenable because prior to recognition the New York courts recognized the right of such corporation to sue in its courts, but principally because the proceeding in the state court in this case, which was instituted in 1925, was not begun by the Russian corporation but was brought by the Attorney General of the State of New York on behalf of the Insurance Department and the People, for the protection of creditors, policyholders and the public everywhere.

CONCLUSION

The District Court properly held that the fund in suit was in no way affected by the Soviet decrees of confiscation and that the petitioner did not acquire title by assignment from the Soviet government.

The Circuit Court properly held that the federal court had no jurisdiction of this cause, the state court having obtained prior jurisdiction of the *res*.

It is respectfully submitted that the decision of the court below is correct and the decree dismissing the bill of complaint should be affirmed.

Respectfully submitted,

JOHN M. DOWNES
ALFRED L. GREEN
Counsel for Respondent.

December, 1935.

[APPENDIX FOLLOWS]

APPENDIX

Section 27, New York Insurance Law:

"Funds and capital within the United States of corporations organized outside of the United States, transacting in this state the business of fire or marine insurance.

"1. No insurance corporation organized and existing under the government or laws of any state or country outside of the United States, hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state, shall transact such business therein unless it shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States, as follows: (a) If authorized to transact the business of fire insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and three hundred thousand dollars deposited with insurance departments or state officers or so held in trust; (b) if authorized to transact the business of marine insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and one hundred thousand dollars deposited with insurance departments or state officers or so held in trust; or (c) if authorized to transact the business of both fire and marine insurance, four hundred thousand dollars deposited with the superintendent of insurance of this state and four hundred thousand dollars deposited with insurance departments or state officers or so held in trust.

"2. For all purposes specified in this chapter, the capital of such a foreign insurance corporation now or hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state shall be the aggregate value of all securities and other property within the United States deposited with insurance departments or state officers and held in trust by a trustee or trustees for the protection of all its policyholders within the United States, or all its policyholders and creditors within the United States, after taking from such aggregate value the same deductions for losses, debts, and liabilities in the United States and for unearned premiums on risks therein not yet expired as are authorized or required by the laws of this state or the regulations of the superintendent of insurance with respect to domestic insurance corporations transacting the same kind or kinds of business. * * *"

Section 63, New York Insurance Law:

"*Proceedings against and liquidation of delinquent insurance corporations.* This section shall apply to all corporations, associations, societies and orders to which any article of this chapter is applicable, and to all corporations, associations, societies and orders which are subject to examination under any section of this chapter, or which are doing or attempting to do or representing that they are doing the business of insurance in this state, or which are in process of organization intending to do such business therein, anything as to any such corporations, associations, societies or orders provided in this article to the contrary notwithstanding; and the words 'corporation' or 'corporations' herein shall also include all such associations, societies and orders as well as all voluntary or unincorporated associations.

"1. Whenever any domestic corporation (a) is insolvent; or (b) has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent, or his deputy or examiner; or (c) has neglected or refused to observe an order of the superintendent to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock corporation, or its reserve, if it be a mutual corporation, shall have become impaired, or (d) has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society or order, without having first obtained the written approval of the superintendent; or (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or (f) has wilfully violated its charter or any law of the state; or (g) whenever any officer thereof has refused to be examined under oath touching its affairs; or (h) if such corporation be organized under article six, seven or eight of this chapter, its condition is found, after examination, to be such that it could not meet the requirements for incorporation and authorization specified in such articles, respectively, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which the principal office of such corporation is located for an order directing such corporation to show cause why the superintendent should not take possession of its property and conduct its business, and for such other relief as

the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require."

* * * * * *

"4. Whenever any of the grounds of jurisdiction over domestic corporations specified in subdivisions (a), (b), (c), (d), (e), (f) and (g) of subsection one of this section exist or arise with reference to any corporation incorporated by or existing under the government or laws of any country outside of the United States and authorized to transact the business of insurance and having assets in this state; or whenever any foreign corporation so authorized and having assets in this state has been placed in the hands of a receiver *or had its property sequestrated in its domiciliary state or country* or in any other state or country, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which such corporation has its principal office for the transaction of business in this state, for an order directing such corporation to show cause why the superintendent should not take possession of its property and conserve its assets for the benefit of its creditors, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

"5. On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such corporation and its officers, agents and employees from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the

court shall either deny the application or direct the superintendent forthwith to take possession of the property and conserve the assets of such corporation, and retain such possession until, on the application either of the superintendent, the attorney general representing him, or of such corporation, its shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and conduct its business. If, on such application, the court shall direct the superintendent to take possession of the property and conserve the assets of such corporation, the rights and duties of the said superintendent with reference to such corporation and its said assets shall be those heretofore exercised by and imposed upon anciliary[1] receivers of foreign corporations in this state."

[1] So in original.

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Nos. 195, 196 and 197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

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against
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Respondent.

UNITED STATES OF AMERICA,
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against
PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
against
LOUIS H. PINK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Samuel E. Morro, et al., as Amici Curiae

BORRIS M. KOMAR,
Counsel for Samuel E. Morro, et al., Amici Curiae.

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LOUIS H. PINK,

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*BRIEF FOR SAMUEL E. MORRO, ET AL., AS AMICI CURIAE.**

Statement.

This brief is filed by the consent of all the parties to this appeal.

*References are all to the Record in No. 195, unless otherwise indicated.

Samuel E. Morro is a resident of the State of New York and a citizen of the United States and was such at all the material times herein mentioned and prior to the Soviet revolution in 1917. He is the owner of 220 shares in the Moscow Fire Insurance Company, whose New York funds the United States Government claims to have acquired by an assignment from the Soviet Government. As such stockholder in the stockholders' action tried in the State Courts of New York, he obtained a judgment for $15,400, the execution on which was stayed pending the determination of these suits.

George Brussendorff and approximately 100 additional claimants are holders of life policies in the First Russian Insurance Company, whose New York funds are being administered by the Superintendent of Insurance of the State of New York. All of these claimants are citizens of countries other than Soviet Union. All of these claimants are not residents of the Soviet Russia. Their claims were allowed and partially paid by the Superintendent of Insurance in the course of his administration of the New York assets of said First Russian Insurance Company. Additional dividends are due and payable from said funds upon the claims of these policyholders.

The Question Considered in This Brief.

Apart from the issue of jurisdiction, *the sole question involved upon this appeal is whether or not our courts should enforce the penal statutes of Soviet Russia.* No question at all of the public policy of the United States is concerned. However, if such question were concerned, the contentions in regard to the doctrines of public policy set forth in the Government's brief are both unsound and contrary to the authorities.

The Doctrines of Unenforcibility of Foreign Penal Statutes and of Foreign Laws Contravening Domestic Public Policy Are Not the Same.

While considerable confusion exists both in the minds of the text writers and the decisions of the courts in regard to the doctrines dealing with unenforcibility of foreign statutes as penal, and as against domestic public policy, the doctrines are thoroughly dissimilar.

The doctrine of public policy is a rule of domestic law and, as such, depends entirely upon the domestic law and varies with changes in domestic law as influenced by its public opinion. The doctrine of unenforcibility of foreign penal statutes is a rule of international law (*Huntington* v. *Attrill,* 146 U. S. 657, 680, 685) which does not depend upon domestic legislation or domestic policy, but as any other rule of international law, requires either a concensus of international states or an international treaty to change it. Moreover, a foreign penal statute, such as a tax statute, may not be against our public policy, yet it will not be enforced.

The basis of domestic public policy is the domestic legislation. The basis of the international rule against unenforcibility of foreign penal statute is the sovereign integrity of the state. To permit the enforcement of a foreign statute as contravening the domestic public policy of the forum may involve the change in this policy. To permit the enforcement of a foreign penal law would mean to yield the authority of the domestic sovereign and to extend extraterritorially the sovereignty of the foreign state. "It would be a manifest incongruity for one sovereign to punish a person for an offense committed against the laws of another sovereignty." (Bradley, J., in *Ex Parte Bridges,* 2 Woods, 428, 430, cited with approval in *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, p. 272.)

The Penal Character of a Foreign Statute Is to Be Determined Solely By Our Courts.

This question was carefully considered by this Court and by the highest court of the British Empire, the Judicial Committee of the Privy Council, in the famous case of *Huntington* v. *Attrill* (1893), Appeal Cases 150, where the Court said at page 155:

> "Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked. Judicial decisions in the state where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in a position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

This Court adopted this view of the law in *Huntington* v. *Attrill,* 146 U. S. 657, 681.

What Statutes Are Penal.

The question what is a penal statute within the meaning of said international rule was likewise determined by this Court and the other highest courts in the English speaking jurisdictions.

In *Huntington* v. *Attrill,* 146 U. S. 657, this Court said at page 673:

> "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, *depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.*"

In *Huntington* v. *Attrill,* supra, the Judicial Committee of the Privy Council had adopted the rule laid down by this Court in *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, saying at pages 155, 156 and 157:

> "The general law on this point has been correctly stated by Mr. Justice Story in his 'Conflict of Laws,' and by other text writers; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of someone representing the public, are local in this sense, that they are only cognizable and pun-

ishable in the country where they were committed. *Accordingly, no proceeding, even in a shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches of the lex fori, ought to be admitted in the Courts of any other country.* * * *

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin* v. *The Pelican Insurance Company*, 127 U. S. 265. By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporation carrying on business under it who failed to comply with one of its enactments.

The penalty was recoverable by the commissioner of insurance, an official entrusted with the administration of the Act in the public interest, one-half of it being payable into the State Treasury, and the other to the commissioner, who was to defray the cost of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other state. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text books, and the dictum by Chief Justice Marshall already cited (*The Antelope*, 10 Wheat. 66, 123), went on to say:

> 'The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.*'

Their Lordships do not hesitate to accept that exposition of law, which, in their opinion, discloses

> the proper test for ascertaining whether an action is penal within the meaning of the rule. *A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law has been infringed.*"

This Court, in turn, adopted these statements as its own in *Huntington* v. *Attrill,* 146 U. S. 657, 682, 683.

In *Louks* v. *Standard Oil Co.,* 224 N. Y. 99, Mr. Justice Cardozo said, at pages 102 and 103:

> "The question is whether it is penal within the rules of private international law. *A statute penal in that sense is one that awards a penalty to the state,* or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong (*Huntington* v. *Attrill,* 146 U. S. 657, 668; *Huntington* v. *Attrill,* 1893 A. C. 150, 156; *Brady* v. *Daly,* 175 U. S. 148, 154, 157; *Raulin* v. *Fischer,* 1911 2 K. B. 93; *Dicey, Conflict of Laws,* p. 209). *The purpose must be,* not reparation to one aggrieved, but *vindication of the public justice* (*Huntington* v. *Attrill,* 146 U. S. 668; *Brady* v. *Daly,* supra)."

The above rule of international law applies equally to the enforcement of state laws by the Federal Courts and the state laws of several states by the courts of other states (*Huntington* v. *Attrill,* 146 U. S. 657, 671-673; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 291).

For this reason, we will cite indiscriminately decisions dealing with foreign and domestic state legislation, since they are governed by the same international rule.

Soviet Confiscatory Decrees Are Penal Law.

It is freely conceded in the bills in equity filed by the United States in the three above suits, that the title to the assets herein involved was acquired by the Soviet Government through the confiscatory decrees (p. 7).

These decrees themselves are set forth in the record and they provide in effect that the insurance in Russia is declared a state monopoly; that corporations doing insurance business in Russia are annulled, and that the assets of these corporations are expropriated by the state and made a part of the general funds of the Russian treasury (pp. 29-30). No compensation is provided either for the policyholders or the stockholders of said Russian corporation.

Whether said confiscatory acts of the Soviet Government will be deemed to provide for a special revenue, impost or a fine for the benefit of the state, in either case, the decrees in question clearly are penal in their operation and effect and provide for collection of a penalty without any offense on the part of the victims and solely for the benefit of the Russian state. It is immaterial whether the object of the penal statute is the increase in the public treasury of the state or the institution of a new public policy for furthering its public welfare.

In *Oklahoma* v. *Gulf, Colorado & Santa Fe Railway Co.*, 220 U. S. 290, this Court said at page 300:

> "Those principles must, in our opinion, determine the present case adversely to the State. Although the State does not ask for judgment against the defendant railroad company for the penalties prescribed by the Oklahoma statutes for violations of its provisions, yet *she seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a*

public policy touching a particular subject relating to the public welfare. The statute viewed as a whole is to be deemed a penal statute. *The present suit, although in form one of a civil nature, is, in its essential character, one to enforce by injunction regulations prescribed by a State for violations of one of its penal statutes* and is, therefore, one of which this court cannot take original cognizance at the instance of the State."

In *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, this Court said at page 299:

> "The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. Wisconsin Rev. Stat., sec. 1920. *The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one half into her treasury, and the other half to her insurance commissioner,* who pays all expenses of prosecuting for and collecting such forfeitures. Wisconsin Stat. 1885, C. 395."

The doctrine was applied in numerous cases.

The precise question herein involved was decided by this Court in *Baglin* v. *Cusinier Co.*, 221 U. S. 580. In that case, the question arose as to the effect of the confiscatory law of the recognized French Government passed in 1901 whereby the property of the catholic religious orders

was confiscated in France. The Order of Carthusian Monks since the Middle Ages produced and distributed throughout the world a liqueur known under the name of "Chartreuse." The Monks owned the trade marks on the Chartreuse in the United States. When the Monks were expelled from France, they moved to Tarragona, Spain, and there continued to manufacture the Chartreuse. The French liquidator also continued to manufacture what he claimed to be the Chartreuse at the original monastery, known as "La Grand Chartreuse," in France.

The French liquidator appointed Cusinier Co. as the distributors of the French Chartreuse in the United States, and Baglin, the procurator of the Order of Carthusian Monks, brought a suit against Cusinier Co., asking the United States courts to restrain Cusinier Co. from using the trade-marks and labels relating to the Chartreuse liqueur in the United States. Cusinier Co. insisted that by the French law the rights to the American trade-marks and labels on the Chartreuse passed to the French liquidation. Mr. Justice Hughes stated at page 591, that one of the questions which the Court had to decide was as follows:

> "On the merits, the questions presented are:
>
> (1) What rights, with respect to the designations and marks involved, were enjoyed by the Carthusian Monks prior to their expulsion from the French Monastery;
>
> (2) *What effect upon their rights had* (a) *the liquidation proceedings in France.* * * *"

And he answered it in behalf of this Court as follows at page 596:

> "We are not concerned with their authority under the French law to conduct the business, but it is not the business to which the trade-marks in this

country relate. That business is being conducted according to the ancient process by the Monks themselves. *The French law cannot be conceived to have any extraterritorial effect to detach the trade-marks in this country from the product of the Monks, which they are still manufacturing.*

The matter was put thus by Lord MacNaghten in the House of Lords, in *Lecouturier* v. *Rey* (1910) A. C. 262, page 265:

> 'To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market. *But it is certainly satisfactory to learn from the evidence of experts in French law that the Law of Associations is a penal law—a law of police and order—and is not considered to have any extraterritorial effect. It is also satisfactory to find that these legal experts confirm the conclusion which any lawyer could draw from a perusal of the French judgments in evidence in this case, that the sale by the liquidator of the property bought by the appellant company has not carried with it the English trade-marks, or established the claim of the appellant company to represent their manufacture as the manufacture of the Monks of La Grande Chartreuse, which most certainly it is not.'*"

In *Mills Novelty Co.* v. *Dupouy,* 203 Fed. 254, the Circuit Court of Appeals for the Seventh Circuit considered the suit to recover penalties paid in Venezuela pursuant to Venezuelan law. It said at pages 258 and 259:

"The issue of law, therefore, is narrowed, as we believe, to this inquiry: Do the ultimate facts so established of consignment and entry of the defendant's goods—namely, that they were shipped by and consigned to the defendant in care of the plaintiff, under notice to the plaintiff for entry at a Venezuelan port, and they were thus entered in violation (for any cause) of the law of that country, resulting in confiscation of the goods—create liability in personam against the defendant to reimburse the plaintiff for the amounts of fine and expenses incurred by the plaintiff in such unlawful transaction? * * *

The unlawful entry could not subject the consignor, who was not present, to personal liability therefor, its utmost liability being in rem (as imposed) for forfeiture of the goods; *and however the procedure against the plaintiff was either caused or intended, the ensuing fines and charges cannot be enforceble per se against the defendant in this country and jurisdiction. Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 281."

In *Second Russian Insurance Co.* v. *Miller,* 297 Fed. 404, it was urged upon the Circuit Court of Appeals for the Second Circuit, that a law passed by the Imperial Government of Russia, a recognized government, which dissolved a contract between a Russian corporation in Russia, and a German partnership, both of which were non-residents of the United States, should be recognized as binding on our courts. In rejecting this contention, the Court said at pages 406 and 411:

"But it is argued that the Russian ukase of October 29, 1916, as a matter of law, terminated the contract and therefore the right of H. Mitzenbacker, Jr., to commissions under its contract with the appellant. It is said that by the rules of comity, and

under the international law, our courts must give effect to the Russian ukase. *It is pointed out that our government and that of Russia occupied the diplomatic status of friendly nations, between which all the principles of comity are operative. The decree of a sovereignty is local, and cannot be extended beyond its territorial limits.* Sovereignty does not exist where it is not supreme. * * *

We conclude that the Russian ukase had no extra-territorial effect, and did not operate as a cancellation of the contract. The moneys in question are satisfactorily shown to be the property of an enemy, and therefore subject to seizure by the Alien Property Custodian."

In the recent case of *Banco de Vizcaya* v. *Don Alfonso* (1934), 151 Law Times Report, 499, where the English Court considered the effect of the confiscatory decrees of the Spanish Government purporting to confiscate the security of a Spanish bank held by it in its name in England since 1923, the Court said at pages 500 and 501:

"On the 13th May, 1931, a decree was enacted by the Presidency of the Provisional Government of the Spanish Republic, providing by Art. 1 for the seizure of all properties situate or placed in Spain which might belong to the private fortune of the defendant, and by Art. 3 that bankers established in Spain, who had in deposit such properties as were referred to in Art. 1, should make delivery thereof to the Spanish Treasury. On the 3d June, 1931, an order of the Spanish Ministry of Finance was made for the due execution of the decree of the 13th May, 1931, and on the 26th November, 1931, a decree was enacted by the Constituent Cortes of Spain declaring the defendant to be guilty of high treason and an outlaw, and that all the properties,

rights and grounds of action belonging to him which were situated within the national territory should be seized for its own benefit by the Spanish State. * * *

In such circumstances, the judgment of the Judicial Committee of the Privy Council in *Huntington* v. *Attrill* (1893), A. C. 150 at p. 155, lays down that I have to construe and apply an international rule, and to determine, first, the substance of the right sought to be enforced, and, in the second place, whether its enforcement will, directly or indirectly, involve the execution of a penal law of another state.

In my judgment, the substance of the right sought to be enforced by the plaintiffs is the delivery to them of the securities in question and the enforcement of this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic. The plaintiffs' whole case is that they are bound by virtue of the decrees to hand over the securities to the Spanish Government in defiance of the mandate of the defendant, and, that being so, it seems to me unarguable that the enforcement of the plaintiffs' right will directly or indirectly involve the execution of the decrees. It was contended on behalf of the plaintiffs that, though the decrees may be penal, the plaintiffs' claim is not a penal action; because they are not asserting the right of the Spanish Government but their own contractual right to the securities as against the Westminster Bank. I am unable to accept this contention.

The plaintiffs are not asserting their contractual rights as they originally existed but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but

the rights of the Spanish Republic. It is true, as is pointed out in *Huntington* v. *Attrill* (supra) that some actions for penalties are not penal actions within the meaning of the above mentioned international rule—where, for instance, the penalties are not exigible by the State in the interest of the community, but by private persons in their own interest. But in the present case the penalty imposed is seizure by the State for its own benefit of all the defendant's properties, rights, and grounds of action, and this penalty is imposed in terms for high treason, and the only way in which the plaintiffs are able to assert their claim that they are entitled as against the defendant is by virtue of these decrees, and they are compelled to admit that they have no personal right or title to the property in the securities. In the words of Lord Loughborough in *Folliott* v. *Ogden* (1 Hy. Bl. 123) at p. 135:

> 'The *penal laws of foreign countries* are strictly local, and *affect nothing more than they can reach and can be seized by virtue of their authority;* a fugitive who passes hither comes with all his transitory rights; *he may recover money held for his use, stock, obligations, and the like; and cannot be affected in this country by proceedings against him in that which he has left,* beyond the limits of which such proceedings do not extend.'

These words have frequently been cited with approval, and in my judgment, they are directly applicable to the present case. I, therefore, hold that H. M. Don Alfonso and not the plaintiff is entitled to the securities in question."

In *Manufacturing Co., etc.,* v. *Huth,* K. B. D. (1928), reported in British Year Book of International Law for 1930, at pages 235-237, Wright, J., held:

> "That the Soviet confiscatory decrees did not purport to, and in any case could not, have the effect of transferring the ownership of the bonds and balances of the plaintiff company in the hands of the defendants in England, since this property was not situated in the jurisdiction of the Soviet Government and such decrees could have no extra-territorial effect."

The French Court arrived at similar decision. The Court of Appeals of Paris in *Northern Russian Insurance Co.* v. *Union & Phenix Insurance Co.*, McNair (1927-8), No. 42, said at page 66:

> "But the recognition by the French Government of the government of the Russian Socialist Republic (October 28, 1924) does not make applicable in France the legislation in force in Russia since 1918, as it is against the general principles of French law and the public policy of France; and to sanction the principle of the Soviet decree of December 13, 1918, inasmuch as it abolishes without indemnity within Russian territory private property for the benefit of the State, would be to recognize a right of spoliation contrary to the principle of public policy of the inviolability of the right of property derived from Article 545 of the French Civil Code.
>
> *In addition, the Soviet Government has had to recognize in accordance with instructions given to its agents abroad, that the laws of nationalization of private property could not have anything but an exclusively territorial application and could not be extended beyond the Russian territory.*"

The international rule applies regardless of the location of property. It is claimed because of the operation of the doctrine "mobilia sequuntur personam," the title to the

property of the Russian corporations herein involved is to be governed by Russian law, which is to be recognized and enforced by our courts irrespective of the fact whether it is or it is not penal in its nature and effect. This assertion of the Government has no legal basis to support it.

In *Baglin* v. *Cusiner*, supra, the property in question was that of a French religious corporation located in France and naturally governed by French law. Both this Court and the English courts refused to apply to it confiscatory laws of France.

In *Second Russian Ins. Co.* v. *Miller*, supra, the contract was made in Russia by a Russian corporation then domiciled in Russia. Yet the Court refused to apply to it Russian Imperial law annulling its effect.

In *Banco de Vizcaya* v. *Don Alfonso*, supra, the securities in question stood in the name of a Spanish bank, located in Spain and governed by Spanish law. Yet, its suit for delivery of said securities was dismissed by the English court.

In *Manufacturing Co., etc.*, v. *Huth*, supra, the plaintiff company was a Russian concern with its main office in Russia, yet, the English court sustained, after the recognition of the Soviet Government by Great Britain, its claim to securities and money held by the defendant in England.

In *Republic of Peru* v. *Dreyfus Bros.*, 38 Chan. Div. 348, the confiscatory decrees of the Peruvian Government with regard to a contract made between it and Dreyfus Bros. in Peru and governed by the Peruvian law were refused recognition by the English courts.

Furthermore, it is immaterial for the purpose of applying the international rule herein discussed, under what guise the government attempts to collect its penalties. It may take the form of a tax (*State of Colorado* v. *Harbeck*,

232 N. Y. 71; *In re Visser* [1928], Chan. 877); an impost (*Moore* v. *Mitchell,* 30 Fed. [2nd] 600, 602; *Municipal Council* v. *Bull* [1909], 1 K. B. 7); a fine (*Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265; *Mills Novelty Co.* v. *Dupouy,* 203 Fed. 254); a license fee (*Oklahoma* v. *Gulf, Colorado & Sante Fe Ry. Co.,* 220 U. S. 290); a custom duty (*Attorney General of Canada* v. *Schultze* [1901], 9 Scot. Law Times 4), or of an expropriation (*Banco de Viszcaya* v. *Don Alfonso* [1934], 151 Law Times Report 499; *Republic of Peru* v. *Dreyfus Bros.,* 38 Chan. Div. 348; *Wolf* v. *Oxholm,* 6 Maule & Selwyn 92, 99, 100, 106 [105 Eng. Repr. 1177]; *Frenkel & Co.* v. *L'Urbaine Fire Ins. Co.,* 251 N. Y. 243).

The rule applies whether foreign penal law is invoked to sustain a suit (*Wisconsin* v. *Pelican Ins. Co.; State of Colorado* v. *Harbeck; In re Visser; Banco de Viszcaya* v. *Don Alfonso,* supra), or to maintain a defense (*Attorney General of Canada* v. *Schultz; Wolf* v. *Oxholm; Manufacturing Co., etc.,* v. *Huth,* supra; *Folliott* v. *Ogden,* 1 Hy. Bl. 123, 135, 126 Eng. Repr. 75). The international rule will still protect our sovereignty from compelling it to enforce Soviet penal laws and thereby extend the sovereignty of the Soviet Government to the territory of the United States.

In other words, whether the alleged title of the Soviet Government to the funds in question is derived by it as a government, or as the confiscatory liquidator of Russian corporations, the result is the same. In either instance, what is sought is to enforce Soviet penal decrees. In either instance, our courts will not aid. The gravamen of the doctrine is not in the capacity in which the penal law is sought to be enforced, but in the penal nature of the foreign statutes themselves.

The International Rule Does Not Affect Our Diplomatic Relations With the Soviet Government

It is claimed by the Government, in its brief, that the application of this doctrine would result in the intermeddling of our courts with foreign relations of the United States. The doctrine had been known to English speaking jurisprudence since the decision of Lord Chancellor Eldon in *Barclay* v. *Russell*, 3 Vesey Jr. 424. Since the doctrine is a rule of international law, it must be deemed to have been known at all times to the Soviet Government. No government can complain or take offense to any rule of international law when applied to it. The Court should also assume that when our and the Soviet governments entered into the agreement in question on November 16, 1933, both were aware of the rule of international law herein discussed.

Moreover, the record conclusively shows that the Soviet officials by their own instructions to their subordinates have recognized this rule and confirmed their acquiescence in the same by stressing the fact that their penal confiscatory statutes were not applicable to non-Russian corporations or nationals, or to property, even of Russians, outside of Russia (Manhattan Company's Record, pp. 39-42).

Government's Authorities Are Not in Point.

Not a single case is cited by the Government in support of its proposition that our courts should enforce penal confiscatory laws of Soviet Russia. The cases upon which it does rely, *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, and *Underhill* v. *Hernandez*, 168 U. S. 250, do not have the slightest application to the facts herein involved.

In each of the said cases, this Court refused to sit in judgment over the *acts* of foreign governments consisting in physical seizure of property or spoliation of tangible property within its own territory. There was no question of enforcing foreign penal *law* in this country. In each case, a physical act of a foreign government done within its own territory was recognized as a fait accompli. In none of those cases, this Court was called upon to apply foreign law. In none of the above cases, this Court was called upon to confer a title to the assets in the United States by reason of foreign penal law.

On the contrary, in all of those cases, the Court was either asked to leave undisturbed the possession of tangible property actually sold by the foreign government in its own country and pursuant to the laws thereof or to punish an American concern for acts done at its instigation by foreign governments in its own country. In none of the above cases, was an attempt made to claim title to the property in the United States by an instrument made in the United States, the sources of which title were foreign penal and confiscatory laws.

In *Princess Paley* v. *Weisz* (1929), 1 K. B. 718, the English Court of Appeal applied to Russian property confiscated and sold by the Russian Government in Russia, the principle of the above American cases and, summarizing their legal effect, said at page 736:

> "This court will not inquire into the legality *of acts* done by a foreign Government against its own subjects *in respect to property situate in its own territory.*"

Government's Fallacies With Regard to the Doctrine of Public Policy.

1. *Public policy as a rule of law is not governed by an executive act.* The Government contends that the assignment as an executive act of the President determines the public policy of the United States. No executive act can ever determine any legal principle in the United States where the judicial and the executive branches of the government are distinct.

A legal principle may be affected in the United States either by statutes or by judicial decisions. It never can be established or destroyed by an act of the executive branch of the government. Public policy was defined in many ways but each of such definitions recognized it as a *legal* doctrine. The authorities are unanimous on this point. Public policy is "a rule of law" (*Oliver* v. *Wilder*, 27 Colo. App. 337; *Spaulding* v. *Maillet*, 57 Mont. 318; *Cahill* v. *Gilman*, 84 Misc. [N. Y.] 372; *Johnston* v. *Chicago Great Western Ry. Co.*, 164 S. W. 260, 262); "a legal principle" (*Fidelity & Deposit Co.* v. *Moore*, 3 Fed. [2nd] 652, 653; *State* v. *Gateway Mortuaries*, 87 Mont. 225; *Guggenheim* v. *Guggenheim*, 168 N. Y. S. 209, 212; *Maxfield* v. *Cincinnati D. & T. Traction Co.*, 111 Ohio St. 139; *Nashville Ry. & Light Co.* v. *Lawson*, 144 Tenn. 78; *American Nat. Ins. Co.* v. *Coates*, 112 Tex. 267); "public policy in relationship to administration of law" (*People* v. *Herrin*, 284 Ill. 368; *Master Builders Assn.* v. *Carson*, 132 Kan. 606; *Walsh* v. *Hubberd*, 122 Md. 168; *Driver* v. *Smith*, 89 N. J. Eq. 339; *Elzey* v. *Ajax Heating Co.*, 10 N. J. Misc. R. 281; *Le Masters* v. *Board of Education*, 105 W. Va. 81).

Furthermore, public policy is deducible only from the constitutional and statutory laws and judicial decisions (*Hagan* v. *Cone*, 21 Ga. App. 416; *Chaste* v. *Louisville Ry. Co.*, 167 Ky. 75; *N. Y. Life Ins. Co.* v. *Hamburger*, 174 Mich. 254; *In re Rahn's Estate*, 316 Mo. 492; *Spaulding* v.

Maillet, 57 Mont. 318; *Cruse* v. *Kischl,* 55 Mont. 258; *Matter of Lampson,* 161 N. Y. 571, 519; *Cahill* v. *Gilman,* 84 Misc. [N. Y.] 372; *Brown* v. *Am. Ry. Express Co.,* 128 S. C. 428; *Willys-Overland Co.* v. *Chapman,* 206 S. W. 978, 981).

To ascertain the public policy of the United States, the Court, in addition to the above, must take into account "the constitution, laws or treaties of the United States, or the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application." (*Hartford Fire Ins. Co.* v. *Chicago, Milwaukee, etc., Ry. Co.,* 175 U. S. 91, 100.) See also: *Federal Trade Comm.* v. *Paramount Famous Lasky Corp.,* 57 Fed. (2nd) 152, 154; *Southern Ry. Co.* v. *Blunt & Ward,* 155 Fed. 496, 497; *U. S.* v. *Trans-Missouri Freight Assn.,* 58 Fed. 58, 69; *Swan* v. *Swan,* 21 Fed. 299, 301.

Conversely, the courts are not at liberty to look into anything else, including the acts of the executive government to ascertain the public policy. Story, J., speaking for this Court in *Vidal* v. *Girard's Executors,* 2 How. 127, said at page 197:

> "Nor are we at liberty to look at general considerations of the supposed public interest and policy of Pennsylvania upon this subject, *beyond what its constitution and laws and judicial decisions make known to us.*"

And see on the same point: *People* v. *Hawkins,* 157 N. Y. 1, 12; *Weeks* v. *New York Life Ins. Co.,* 128 S. C. 223, 227; *Spead* v. *Tomlinson,* 73 N. H. 46, 58, 59.

2. *Government's executive acts themselves are subject to public policy rule.* The Government concedes in its brief that the Soviet assignment is not a treaty, but contends that because it is an act of its executive branch, it is not to be tested by the doctrine of public policy which merely

applies to private persons and not to the executive branch of the Government. While the suggestion may be ingenious, it is thoroughly refuted by decisions.

In *Andrew* v. *Bacon*, 208 Iowa 385, the Superintendent of Banks, by a contract with a director of an insolvent bank, agreed to allow it to operate upon the guarantee of the directors to keep the bank solvent. The Court, in holding the agreement invalid, said at page 390:

> "Manifestly, such an agreement tended to lead the superintendent away from his official duty and start him upon a voyage uncharted by, and contrary to, the statutes. Thereby the superintendent was induced to abandon 'the discharge of an official duty.' *Public policy clearly prevents that illegal course.* *Cole* v. *Parker*, 8 Iowa (Clarke) 167; *Cass County* v. *Beek & Co.*, 76 Iowa 487; *Dodson* v. *McCurnin*, 178 Iowa 1211."

In *Arms & Short* v. *Denton*, 212 Ky. 43, the Court said at page 47:

> "There is no escape from the conclusion that the statute was intended to prevent any officer of a city from entering into a contract for the benefit of himself as an individual with the city. Appellant Arms, a member of the partnership of Arms & Short, entered into a contract with the city from which he no doubt expected to make a profit while he was marshal of the city, a public officer of that municipality. *This was clearly against public policy* * * *."

In *State* v. *Bowman*, 184 Mo. Ap. 549, the City Council appointed one of its members the City Clerk. In holding the appointment void, the Court said at pages 552 and 553:

> "The defendant contends, and in this we agree

> as did the learned trial judge, that, granting that power and duty to select a city Clerk is vested in the city council, then such council could not select and appoint one of its own number to that office. *This is true because such exercise of the affirmative power is against public policy.*"

In *Parker* v. *The Trustees,* 96 Ohio St. 29, the Public Board engaged a lawyer at a fixed remuneration and reserved to itself a power to increase it. In holding that the contract was unenforcible, the Court said at page 33:

> "*We think that sound public policy forbids that public officials* should be permitted to definitely fix a certain sum to be paid for services to be rendered to the public, and at the same time reserve to themselves the arbitrary power to add to the sum named in the contract after the services are rendered."

3. *The executive branch of our government is not the sovereign establishing our public policy.* While it is true that the public policy is established by the sovereign, the Government is in error in alleging that the executive branch of the Government is that sovereign.

In our constitutional scheme the sovereign is the people (*Kennett* v. *Chambers,* 14 How. 38, 49; *Filbin Corp.* v. *U. S.,* 266 Fed. 911, 914; *Kennebec Water Dist.* v. *Waterville,* 96 Me. 234, 242) and the will of the people in defining its public policy is not manifested by any acts or utterances of the executive branch of the government, but solely through those of the legislative branch (*Chicago, etc., Ry. Co.* v. *McGuire,* 219 U. S. 549, 565; *Johnson* v. *U. S.,* 163 Fed. 30, 32 [Holmes, J.]; *Strauss & Co.* v. *Canadian Pac. Ry. Co.,* 254 N. Y. 407, 413, 414; *Kennebec Water Dist.* v. *Waterville,* supra; *Borgnis* v. *Falk Co.,* 147 Wisc. 327, 351).

It is well settled that, in acquiring property, the government takes title as if it were a private individual. It has no special privileges whatsoever. The same rule of law governs acquisition of property by a private person as that by the government. "The truth is, that when the government becomes the purchaser of property, it takes the title subject to the same rules as those which regulate the transfer of it to private persons." (*Briggs* v. *A Light Boat,* 7 Allen [Mass.] 287, 297.) When it acquires a property, it takes it subject to all such incumbrances thereon or claims against it as existed against the grantor thereof (*U. S.* v. *Perkins,* 163 U. S. 625, 630; *The St. Jago de Cuba,* 9 Wheat. 409, 416, 417; *Briggs* v. *A Light Boat,* supra).*

If the Government claims that it acquired title here from the Soviet Government as a corporate liquidator, then the assignment is certainly invalid because the liquidator's title will carry with it the duties of the liquidator or receiver of private corporations (*Lafayette Trust Co.* v. *Beggs,* 213 N. Y. 280, 283; *Matter of Silkman,* 121 A. D. [N. Y.] 202). The Government cannot accept property for any purposes other than governmental (*Federal Constitution,* Art. 1, Sec. 8, Cl. 1; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 158; *U. S.* v. *Alex Dassel Iron Works,* 31 Fed. [2nd], 535, 537). Certainly the winding up of foreign private corporations does not savor of any governmental function of the United States.

4. *Confiscation of property is not part of our public policy.* The utmost effect of international comity is to make a foreign statute equivalent to a domestic statute. Our courts naturally cannot give to a foreign statute greater effect than to the command of the domestic sov-

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*"The United States cannot convert to itself the property of another, by its own declaration, or its own authority; * * *" (U. S. v. Union Pac. R. Co., 28 Fed. Cas. [No. 16,598], 333, 336, affd. 98 U. S. 569).

ereign.* In *Kolbin & Sons* v. *Kinnear & Co.* (1930), Session Cases (Scot.) 724, Lord Alness said at page 738;

> "* * * I think the answer is that the Soviet Government has been recognized by Great Britain, both de facto and de jure, as the Government of Russia; that the recognition dates back, in accordance with authority, to the foundation of the Republic in 1917; and that this decree, therefore, is *entitled to the same respect as a statute of the United Kingdom.*"

The United States is not a full fledged sovereign (*Hodges* v. *U. S.*, 203 U. S. 1; *Filbin* v. *U. S.*, 266 Fed. 911, 914). It is a government of delegated powers (*In re Quarles*, 158 U. S. 532; *Logan* v. *U. S.*, 144 U. S. 263; *Chae Chan Ping* v. *U. S.*, 130 U. S. 581). The property here involved is in the United States and is protected by the Federal Constitution, notwithstanding the fact that it belongs to aliens (*Truax* v. *Raich*, 239 U. S. 233, 239; *U. S.* v. *Wong Kim Ark*, 169 U. S. 649, 695; *Wong Wing* v. *U. S.*, 163 U. S. 228, 242; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369).

Even if the confiscatory title here claimed by the Government arose out of a formal treaty and not from a mere executive agreement, "It would not be contended that it extends so far as to authorize what the Constitution forbids * * *" (*Geoffroy* v. *Riggs*, 133 U. S. 258, 267). And see *The Cherokee Tobacco*, 11 Wall. 616, 620-1. Our Government could not pass a law confiscating private property without compensation and sustain that confiscation in our courts (Fifth Amendment to the Federal Constitution). In fact, no statute contrary to our public law could be enforced by our courts. (*Bank of New York* v. *Owens*, 2

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*Compare similar principle in regard to rights of aliens in the United States under treaties which are never permitted to exceed those of our citizens (Todock v. Union State Bank, 281 U. S. 449, 454; La Republic Francaise v. Saratoga Vichy Spring Co., 191 U. S. 427, 439).

Pet. 527, 539.) If our own statute could not be sustained if it provided for confiscation of property located in the United States, we are at a loss to understand how that result may be achieved by reliance upon a foreign statute, particularly when this Court expressly held that Soviet confiscatory policy is adverse to our jurisprudence and the policy of our people.

In *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, Chief Justice Hughes, speaking of the confiscatory acts of the Soviet Government in Russia, said at pages 491 and 492:

> "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. *The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments.*"

In *Worthen Co.* v. *Thomas,* 292 U. S. 426, 433, as further elucidating the public policy of this country, this Court, speaking of the police power of the State, said that it did not "permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

Dated, New York, December 16th, 1935.

Respectfully submitted,

BORRIS M. KOMAR,
Counsel for Samuel E. Morro, et al., Amici Curiae.

FILE COPY

DEC 17 1935

IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA, *Petitioner* v. BANK OF NEW YORK TRUST COMPANY	No. 195
UNITED STATES OF AMERICA, *Petitioner* v. PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, Successor to the BANK OF MANHATTAN TRUST COMPANY	No. 196
UNITED STATES OF AMERICA, *Petitioner* v. LOUIS H. PINK, Superintendent of Insurance of the State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827	No. 197

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF SAMSON SELIG, AS *AMICUS CURIAE*

SAMSON SELIG
Amicus Curiæ

SAMSON SELIG
WILLIAM F. ROCHE
Of Counsel

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IN THE

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No. 195

UNITED STATES OF AMERICA, *Petitioner,*

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BANK OF NEW YORK TRUST COMPANY.

No. 196

UNITED STATES OF AMERICA, *Petitioner,*

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PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, Successor to the BANK OF MANHATTAN TRUST COMPANY.

No. 197

UNITED STATES OF AMERICA, *Petitioner,*

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF SAMSON SELIG, AS *AMICUS CURIAE*

Statement

This brief is filed by Samson Selig, as *Amicus Curiae*, pursuant to the written consent of all counsel, heretofore filed with the Clerk of this Court.

Submission of Brief

In the petition of the United States of America against the Bank of New York and Trust Company, this brief is submitted on behalf of stockholders of the Moscow Fire Insurance Company, one of whom is a resident of Canada, another is a resident of England, and also on behalf of the Deutsche Bank, a German bank, having a lien on certain stock of the Moscow Fire Insurance Company.

In the petition of the United States of America against the President and Directors of the Manhattan Company, successor to the Bank of Manhattan Trust Company, this brief is submitted on behalf of two creditors of the Northern Insurance Company of Moscow. One of said creditors, the Assurance Compagniet Baltica, Aktieselskab (The Insurance Company Baltica, Ltd.), is a resident of Copenhagen, Denmark, and its claim is based on reinsurance treaties with the Northern Insurance Company of Moscow executed in Copenhagen, Denmark, and in Moscow, Russia. The other of said creditors is J. Frank & Co., an unincorporated German company, whose claim is based on policies of cargo insurance, the loss on which was determined by a Prize Court in England.

In the petition of the United States of America against Louis H. Pink, Superintendent of Insurance of the State

of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827, this brief is submitted on behalf of more than 400 policyholders of the First Russian Insurance Company, none of whom is a resident of the Union of Soviet Socialist Republics.

Nature of the Action and Facts

The facts in these three cases have been set out in great detail in the briefs in chief submitted by the petitioner and the respective respondents. Any repetition of them here would be unnecessary duplication.

Summary of the Argument

I. Confiscation and Public Policy. Petitioner's claim rests on Soviet decrees. Foreign decrees are given effect here only by comity. These decrees, being confiscatory, are violative of our public policy and will not be given effect by our courts. The exact point has been decided by the New York Court of Appeals, which has jurisdiction of the funds.

II. The Litvinoff Assignment. The funds in question are not within the Litvinoff assignment, because

(a) Respondents are not American nationals who owe anything to the Russian Government within the meaning of the assignment.

(b) The assignment covers sums due the Soviet Government as successor of prior Governments of

Russia or otherwise. The expression "due to the Soviet Government as the successor to the prior governments of Russia or otherwise" was not intended to cover the funds in question.

(1) The law and the facts surrounding the transaction negative any such intention in the assignment.

(2) The second part of the assignment also negatives such intention.

(3) Under the rules of construction of diplomatic instruments the assignment cannot be construed as petitioner contends.

(4) Petitioner's construction would be contrary to the attitude heretofore taken by the petitioner to protect American claims against the Soviet Government.

III. Jurisdiction. The Supreme Court of the State of New York having acquired jurisdiction over the funds in question, the District Court is without power to interfere with or enjoin the pertinent proceedings therein.

POINT I

The Soviet decree relied upon by the petitioner to pass title to the funds in question has no extra-territorial effect, and, being contrary to our public policy, will not be enforced in our courts.

Baglin v. *Cusenier*, 221 U. S. 580;
James & Co. v. *Russia Insurance Co.*, 247 N. Y. 262;

Petrogradsky M. K. Bank v. *National City Bank,* 253 N. Y. 23;
Matter of People (*Russian Re-Insurance Co.*), 255 N. Y. 415;
Russian Re-Insurance Co. v. *Stoddard,* 240 N. Y. 149;
Sokoloff v. *National City Bank,* 239 N. Y. 158;
James & Co. v. *Second Russian Insurance Co.,* 239 N. Y. 248;
Huntington v. *Attrill,* 146 U. S. 657;
McDonald v. *Mabie,* 243 U. S. 90.

It is well settled that the laws of one country are not enforced in another country as a matter of right, but only under principles of comity. *Bank of Augusta* v. *Earle,* 13 Pet. 519, 598; *Second Russian Ins. Co.* v. *Miller,* 297 Fed. 404, 408, affirmed 268 U. S. 552; *The Apollon,* 9 Wheat. 362; *Hilton* v. *Guyot,* 159 U. S. 113, 163-164, where the Court said:

> "No law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"

When, however, a foreign law sought to be enforced here offends our public policy, comity gives way to our public policy and the foreign law will not be enforced by our courts. *Huntington* v. *Attrill,* 146 U. S. 657, 675, where the Court said:

> *"If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, * * * we are at liberty to decline jurisdiction."*

In *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, the Court of Appeals, by HUBBS, *J.*, stated at page 378:

> "The principle which determines whether we shall give effect to foreign legislation is that of public policy. * * * Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail."

The Russian decrees relied upon by the Government here are decrees of confiscation.* They offend our public policy and, accordingly, our courts will not enforce them under principles of comity or otherwise. They have no extra-territorial effect, nor does the fact that recognition is retroactive give them any validity outside of Soviet Russia.

These principles have been fully covered in the briefs submitted on behalf of the respondents, Bank of New York & Trust Company, Bank of the Manhattan Company, Louis Pink, as Superintendent of Insurance, and the other briefs submitted *amici curiae*. It would be duplication to go fully into the subject and authorities again.

To the universal holdings denying extra-territorial effect to confiscatory foreign legislation the petitioner re-

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* Petitioner's brief euphemistically states the decrees "appropriated" "took over" (pp. 22, 27, 57), and studiously avoids "confiscated," but the complaints frankly say the decree "confiscated and appropriated," etc. (*Bank of New York & Trust Co.*, R. 3; *Manhattan Co.*, R. 3; *Pink*, R. 4).

plies by citing cases dealing with the transfer of ownership of the property of an insolvent foreign corporation in liquidation.

We have no quarrel with such authorities, but from these cases dealing with orderly liquidation of insolvent corporations it is a far cry to hold that it is in accordance with public policy for a state to "confiscate and appropriate" (to use the language of the bills of complaint herein) all of the assets of a financially solvent and going insurance company without a thought of its creditors, its policyholders or its obligations of any kind. The petitioner has not cited and we challenge it to cite a single case where such confiscatory action has been held to be within our public policy, or has been given effect by our courts as to property located here.

In its argument, however, petitioner points out that the Soviet decree of December 1, 1918 provides that a commission shall be established to "liquidate" the insurance companies whose assets were appropriated, and suggests that the Soviet Liquidating Commission acquired a title to assets wherever located that must be recognized in our courts.

Petitioner's contention was rejected by the District Court in the following language:

> "The difficulty with this contention is that the complaints allege specifically that the properties of the two companies were 'confiscated and appropriated' by the Soviet Government. However it is perfectly clear that the liquidation of a corporation implies winding up and distribution of the assets among creditors and stockholders (*Lafayette Trust Co.* v. *Boggs,* 213 N. Y. 260, 263; *Matter of Silkman,* 121 A. D. 202)" (*Bank of New York & Trust Co.,* R. 81-82).

The ruling of the District Court finds abundant support in judicial opinion on the quality of the Soviet "liquidation." The New York Court of Appeals, in *Sliosberg* v. *New York Life Ins. Co.*, 244 N. Y. 482, 491, had under consideration the December 1, 1918 decree and the events that followed it. It found not liquidation, but sheer confiscation. And as to these very Russian insurance companies whose assets are now claimed by the petitioner, the same Court has recognized it as self-evident that there was no liquidation in Russia,—"there is no receiver at the domicile" (*Matter of People* [*First Russian Ins. Co.*], 255 N. Y. 415, 424), "here of course there is no home liquidator" (*Matter of People* [*Second Russian Ins. Co.*], 244 N. Y. 606, 607). Lord Romer, speaking for the English Court of the Soviet's "liquidation" of the First Russian Company, has said:

> "The business of the liquidators was merely to collect what assets remained and hand them over to the state. For it seems quite clear that they were never intended to pay any of the plaintiff's company's liabilities" (*First Russian Ins. Co.* v. *London & Lancashire Ins. Co.*, L. R. [1928], 1 Ch. 922, 953).

There was then no liquidation in Russia. The claim of title through a Russian "liquidator," asserted by the petitioner, is a claim based on sheer confiscation. Our courts are not required to recognize, and will not recognize, such a claim.

The petitioner's error is in the premise that the Soviet Government could obtain the fund in New York. Upon the exact point—whether or not the Soviet Government, as a result of its confiscations, can obtain title to property

having a *situs* outside Russia—the courts of several nations have spoken. So far as we know, in every jurisdiction where the point has arisen, the courts have rejected the contention that the Soviet could by virtue of its confiscations obtain title to assets situated outside its own jurisdiction.

ENGLAND: *The Jupiter* (1927), p. 122, aff'd (1927), P. 250 (Ct. App.),

where Lord Justice BANKS said:

> "The decree had no operation to transfer any property except property within the jurisdiction of the Soviet Republic."

FRANCE: *Etat Russe* v. *Ropit* (1925), 52 Clunet 391 (Trib. Comm. Marseille); (1926) 53 Clunet 667 (Cour d'Appel) (translation in Hudson, Cases on International Law [1929] 137); (1928) 55 Clunet 674 (Cour de Cassation);

GERMANY: *Ginsberg* v. *Deutsche Bank* (1928), Juristiche Wochenschrift 1232, 1233 (Kammergericht, Berlin);

DENMARK: *Council of Russian Orthodox Community in Copenhagen* v. *Legation of R. F. S. F. R.* (1925-26), Ann. Dig. of Int. L. Cases 24 (Sup. Ct. of Denmark);

SWITZERLAND: *Wilbuschewitz* v. *Zurich* (1926), 53 Clunet 1110, 1113 (Trib. Fed.), (1925-26) Ann. Dig. of Int. L. Cases 96.

The foregoing pronouncements by the courts of foreign nations were made in each instance—with the excep-

tion of Switzerland—after the recognition of the Soviet Government by the respective foreign offices.

We need not, however, rely upon foreign decisions.

To the court of last resort of the State of New York the issue of the effect of Soviet decrees upon property situate in New York has been presented since the recognition of the Soviet Government by the United States. The decision was explicit. The New York Court of Appeals declared that these decrees of confiscation are repugnant to "our sense of justice and equity." "That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts" (*Vladikavkazsky Railway Co.* v. *New York Trust Co.*, 263 N. Y. 365, citing *Baglin* v. *Cusenier*, 221 U. S. 580).*

The unsuccessful appellant moved for reargument of the *Vladikavkazsky* decision. *It cited to the Court of Appeals the Litvinoff letter of November 16, 1933. It contended that the assignment to the United States subjected it—a debtor bank holding on deposit funds of a nationalized Russian corporation—to suit by the United States. The Court of Appeals denied reargument* (264 N. Y. 595).

The decision thus made with precise relation to the Soviet Government follows decisions of this Court involving other recognized governments.

Baglin v. *Cusenier*, 221 U. S. 580;
Second Russian Ins. Co. v. *Miller*, 268 U. S. 552.

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* In *Dougherty* v. *Equitable Life Ins. Co.*, 266 N. Y. 71, the Court recognized the authority of the *Vladikavkazsky* case as unimpaired. It directly based its decision that decrees of confiscation afforded a defense upon its view that the insurance policies there in suit specifically provided for construction according to Russian law.

In the *Vladikavkazsky* case the New York Court of Appeals only followed what it had repeatedly said before. As for example in *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248.

In the *James* case the New York Court of Appeals, referring to the same confiscatory legislation of the Soviet upon which the present action is predicated, said:

> "As to the Soviet decree, we think its attempted extinguishment of liabilities is *brutum fulmen*, in England as well as here, and this whether the government attempting it has been recognized or not. Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum. (*Barth* v. *Backus*, 140 N. Y. 230; *Matter of People* [*City Equitable Fire Ins. Co.*], 238 N. Y. 147, 152; cf. *Matter of Barnett's Trusts*, 1902, 1 Ch. 847). The decree invoked by the defendant is not in any true sense a decree of bankruptcy, though even if it were, there would be limits to its extraterritorial validity. A decree of bankruptcy presupposes a distribution of the assets for the benefit of creditors, and this decree is one of confiscation, appropriating the assets for the benefit of the Soviet republic. One government does not execute the tax laws of another (*State of Colorado* v. *Harbeck*, 232 N. Y. 71, 82), nor help another enforcing a penalty or forfeiture (*Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 102)" (239 N. Y., at p. 257).

"Neither comity nor public policy," wrote Judge Cardozo in the *James* case, "requires us to enforce a man-

date of confiscation at the behest of such a government to the prejudice either of our own citizens or of those of any friendly power seeking justice in our courts" (239 N. Y., at p. 257).

In view of these pronouncements it would not appear likely that were the Soviet Government itself the plaintiff it could annul the settled judgments of the Court of Appeals directing payment of these very funds and recover them for itself in actions predicated solely on its confiscation decrees. Nor is its assignee, the petitioner here, in any better case. Neither can recover on a cause of action predicated on a violation of public policy.

Public policy is not the pliable concept that petitioner's counsel would have it. Public policy does, within limits, change with the times; but certain fundamentals of national policy survive all changes short of social revolution. These fundamentals "establish a standard for our Government which the Constitution does not make dependent upon the standards of other governments" (compare *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492). The confiscation of property without compensation remains repugnant to our scheme of things. The fiat of an executive officer cannot unsettle premises imbedded in our social order. It remains with the *courts* to determine public policy. Petitioner would have us believe that the whole question is merely one of foreign relations.

Only confusion is wrought by thinking of the problem as one in foreign relations. The question of *recognition* of Russia is, of course, a matter both federal and executive. The disposition of private rights within the jurisdiction of a court of New York is a matter *neither federal nor executive.*

POINT II

The funds in question are not within the Litvinoff assignment.

A. The respondents are not American nationals who owe anything to the Russian Government within the meaning of the assignment.

The corporations from whom these funds are derived are not American nationals. Obviously they are Russian corporations and have been judicially so declared. *Matter of People re Moscow Fire Insurance Company*, 255 N. Y. 433; *Matter of People re First Rusisan Insurance Company*, 255 N. Y. 428. They still have juristic standing in our courts:

Petrogradsky M. K. Bank v. *National City Bank*, 253 N. Y. 23, 29;
Matter of People (*Russian Reinsurance Co.*), 255 N. Y. 415, 425;
Vladikavkazsky Ry. Co. v. *N. Y. Trust Co.*, 263 N. Y. 369.

The assignment however, limits the source of collection to amounts due from a particular class of debtors, to wit: American nationals.

Of course, the respondents are American nationals. Equally, of course, nobody can seriously contend that the "American nationals" who owe debts to the Russian Government, mentioned in Mr. Litvinoff's letter, can pos-

sibly include American banking corporations and municipal officers merely acting as depositary and disbursing agents of money judicially declared to belong to a Russian corporation.

For example, respondent Bank of New York Trust Company here is holding these moneys by virtue of the decision of the Court of Appeals, *People re Moscow Fire Insurance Company,* 255 N. Y. 433, where the Court said at page 435, in speaking of the release of the Moscow funds by the Superintendent of Insurance:

> "Delivery may be made to a trust company in the city of New York as agent or depositary upon the stipulation of the insurance company and its conservators that the funds will not be withdrawn except upon the order of a court of competent jurisdiction."

Defendant is that trust company, acting here only as agent or depositary. It is fantastic to contend that it is one of the "American nationals" from whom "an amount is admitted to be due or may be found to be due to the Government of Russia." That these funds have been deposited with the defendant as agent or depositary and by an order of the court can hardly change the status of the debt into one due and owing from an "American national."

Unquestionably, Mr. Litvinoff referred to such American nationals as the defendant in *State of Russia* v. *National City Bank,* 69 Fed. (2nd) 44, where an American Bank has always been the debtor to the Russian Government for the latter's funds actually deposited with it.

The respondent Bank of New York & Trust Company, in so far as these funds are concerned, *owes* no money

to any one, least of all to the Soviet government. If and when it is ordered to do so by a court of competent jurisdiction, it will pay out these funds to whomsoever the court finds is owed money by the *Moscow* company. It is this company, and not the respondent, which is at all times the debtor.

In contemplation of law, there is no *debt* due from this defendant to the Soviet Government. A debt is a sum of money due upon contract, express or implied.

> *Hampton* v. *Truckee Canal Co.*, 19 Fed. 1, 4;
> *Guaranty Trust Co.* v. *Galveston City R. Co.*, 107 Fed. 311, 317;
> *Leggett* v. *Bank of Sing Sing*, 24 N. Y. 283, 290.

In American and English Encyc. of Law (2nd Ed.), it is stated in Vol. 8, page 986:

> "The legal acceptance of 'debt' is a sum of money due by certain and express agreement."
> "A debtor is one who owes a debt; he who may be constrained to pay what he owes."

If the funds in question be regarded as being held in escrow, then no title to them would pass until the condition of the escrow should be performed (*Stanton* v. *Miller*, 58 N. Y. 192, 201). Indeed when these funds were deposited it was not known to whom they would become payable (*Bushnell* v. *Chautauqua County Nat. Bank*, 74 N. Y. 290). It was not the ordinary debtor-creditor relationship existing between a bank and a depositor, where the depositor can draw out money at will. As already stated, these funds could not be withdrawn by any one except upon an order of the court. Until such an order be entered, it cannot be said that there is a debt due from the respondent.

Of course the same argument applies to the respondent Bank of Manhattan and the respondent Superintendent of Insurance. Both are holding funds judicially declared to belong to a Russian national pending court order for their disposition. Even had the petitioner and the Soviets meant to seize such funds from those who the courts had said were entitled to them, can it be doubted that the assignment would have been specific on the subject? The assignment says "due * * * from American nationals, including corporations, companies, partnerships or associations." If respondents were meant to be included would not the assignment have further said "whether directly the debtors, or holding the funds as depositary, disbursing agent, or in any other capacity," or some other simple and appropriate language?

B. The Assignment covers sums due the Soviet Government as successor of prior Governments of Russia or otherwise. The expression "due to the Soviet Government as the successor to the prior Governments of Russia or otherwise" was not intended to cover the funds in question.

(1) The law and facts surrounding the transaction negative any intention to include in the assignment the funds in suit.

At this point it becomes necessary to consider the exact language embodied in the Litvinoff letter of November 16th, 1933, which contains the assignment. This letter was written at the same time that a number of other letters, all bearing the same date, were written by Mr. Litvinoff at the time of the recognition of Russia, each one bearing on a different phase of the recognition negotia-

tions, such as religious liberty, abstention from propaganda, etc., etc. They all appeared in the public press at the time of recognition and have since then been published in the American Journal of International Law, volume 28, January, 1934, pages 1, etc., of supplement.

The letter with which we are concerned appears at page 21 of the record of the Bank of New York, and at page 27 of the record of Pink.

The parts of Mr. Litvinoff's letter relative to the assignment, read as follows:

> "The Government of Union of Soviet Socialist Republics will not * * * initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals * * * and also the claim against the United States of the Russian Volunteer Fleet * * * and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of the Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment."

The assignment itself purports to assign amounts which come to the Soviet Government as the successor of prior Russian Governments. It does not in terms purport to convey to the United States the assets situated here of the Moscow Insurance Company, the Northern of Moscow Insurance Company or the First Russian Insurance Company, or indeed of any other nationalized Russian corporation. The petitioner claims that that effect is to be found in the words "or otherwise" following the phrase "as successor of prior Governments."

It would seem strange that if the intent had been present to assign the assets of these corporations, that the assignment should not have said so, either by mentioning the corporations by name or by using some appropriate language. The omission to do so is the more remarkable when we consider the view of nationalization taken by the courts at the time.

Let us see what the situation was at the time that the assignment was handed to the President of the United States by Mr. Litvinoff. At that time the courts of every country in which the question had arisen had held that the Soviet decrees of nationalization could not operate to transfer title to the Soviet Government of property located outside the confines of Soviet Russia (*supra*, pp. 9 and 10). These decrees had been described by our courts as "brutum fulmen" (*James* v. *Russian Insurance Co.*, 239 N. Y. 248).

*The Soviet Government itself had declared by official document on more than one occasion that these confiscatory decrees had no extra-territorial effect.**

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* Some of these Soviet documents are to be found in the record, President and Directors of the Manhattan Company, pages 39, 40, 41, 42. In the Circular issued by the Soviet Commissariat of Justice, it is stated:

> "Proprietary rights of citizens of the R. S. F. S. R. enforcible outside the R. S. F. S. R. are governed by the laws of the country where they are to be enforced (*Manhattan Company*, R., p. 39)."

and in the Circular issued by the Soviet People's Commissariat for Foreign Affairs, No. 42, it is stated:

> "The Law on Property established by the decrees of the Russian Soviet Government does, therefore, determine only legal relations pertaining to property rights as arise on the territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject-matter is situated outside the territory of the R. S. F. S. R. and is not connected with such territory cannot be governed outside the territory of the R. S. F. S. R. by Russian Law and are—irrespective of the nationality of the persons entitled to such rights, be they even Russian Citizens—subject to the effects of local Law."

The petitioner in a footnote in its brief, page 34, states that these circulars were passed on in *Perry* v. *Equitable Life Assurance Co.*, 45 T. L. R.

Under these circumstances is it conceivable that if in the minds of the contracting parties there had been an intent to include in the assignment as Russian Government assets the local assets of Russian private corporations, that the parties would not have unmistakably said so? Would not the assignment have read that the Soviet Government assigned and released "all amounts found to be due it as the successor of prior Governments of Russia or *by nationalization, confiscation, appropriation* or otherwise," or similar words of unmistakable intent? Is it possible that the intent to acquire title by means which our courts had repeatedly declared could not prevail would be left to inference? Is it possible that had there been an intent in the minds of the contracting parties to convey confiscated assets, something new and abhorrent to our whole scheme of life, that the contracting parties

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468, wherein it was held that they did not constitute binding declarations of Russian law and did not restrict the application of the decrees.

These circulars were, however, construed as Russian law by HILL, *J.*, in "The Jupiter," P. (1927) 120, at 144. Affirmed, Court of Appeal, P. (1927) 250. Moreover, in the latest declaration of the British courts on the subject, decided long after the *Perry* case, *In re Russian Bank for Foreign Trade*, Chancery Decisions, 1933, page 745, MAUGHAM, *J.*, at page 759 states:

> "As will be seen later, the Soviet Government does not itself assert that the nationalization decrees have an extra-territorial effect."

and then goes on to say at page 767:

> "The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. This follows, I think from the decisions of Hill J. and the Court of Appeal in The Jupiter. It is interesting to note that the same view is taken by the R. S. F. S. R. itself in a circular dated April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all District Courts dated September 26, 1923, which are set out in the elaborate judgment of Hill J. above referred to. These circulars show that the Soviet Government does not regard the nationalizing decrees as having any extra-territorial effect even as against Russian citizens."

would not have said so in the most specific language? Would they have left such a meaning to be inferred from so vague and general an expression as "or otherwise"?

What were the assets which obviously the Soviet Government meant to convey to the United States? The former Russian Imperial Government and the Kerensky Governments had various and substantial sums of money deposited in American banks wherein the American banks were the *direct* debtors of the former Russian Government.

For example:

> Several million dollars in the National City Bank as to which a suit was then pending in the United States District Court for the Southern District of New York, entitled "State of Russia *v.* Bankers Trust Company and National City Bank, defendants" (69 Fed. (2d) 44).
>
> Again, there was a claim for $4,976,722.78, with interest, being monies deposited by the former Russian Government with the Guaranty Trust Company of New York (*Bank of New York,* R. 19).
>
> There was also a claim for $15,000.00 against the Guaranty Trust Company of New York arising out of a contract between the Russian Government and the Morton Truck & Tractor Co. (*Bank of New York,* R. 19);
>
> There was also a claim for $11,680.00 against the New York Trust Company on Account of monies alleged to have been deposited by the Russian Financial Attache on or about September 10, 1918, to cover interest on the bonds of the Vladikavkazsky Railroad Company, which interest had been guaranteed by the former Imperial Russian Government (*Bank of New York,* R. 19);

There was also a claim of the Russian Government for approximately $1,050,000 against the Curtiss Aeroplane and Motor Company (*Bank of New York,* R. 19);

There was also a claim for approximately $384,-118.07 with interest, for monies due from the Canadian Pacific Railways Company under contracts with the Russian Government (*Bank of New York,* R. 19);

There was also a claim for approximately $1,412,532.35 with interest on account of the amounts due from the United States Shipping Board for the requisition of Hulls Nos. 6 and 7 of the Russian Volunteer Fleet; a claim for approximately $218,750 originally deposited with the Guaranty Trust Company as escrow money on Hull No. 6 under contract for the purchase of the said hull by the Russian Volunteer Fleet; a claim for the sum of approximately $23,643.75 on account of balance due from the United States Shipping Board in connection with the charter of certain steamers of the said Russian Volunteer Fleet (*Bank of New York,* R. 19).

These were the type of claims which it was intended to assign to the United States for collection by it. These were all Russian Government monies. Some of them stood directly in the name of the Russian Government. Others the Soviet Government claimed "otherwise." For example, the $11,680 held by the New York Trust Company on account of payments made by the Russian Financial Attache in connection with interest on a bond issue of the Vladikavkazsky Railway Company. These monies

did not stand in the name of the Russian Government, but had for various reasons been credited to the Vladikavkazsky Railway Company, but inasmuch as the payments had been actually made by the former Russian Government, the Soviet Government might make claim thereto.

That was the kind of a claim which was intended to be covered by the words "or otherwise," and if monies such as are involved in these suits are intended to be included, it is unbelievable that the draftsman of the Litvinoff assignment would not have so stated. Why should the draftsman of the assignment be careful to include and specify by name the amounts due in connection with the Russian Volunteer Fleet claim, but not think it necessary to specify equally great amounts which were the property of the Moscow Fire Insurance Company and of the First Russian Insurance Company?

Besides the amounts which might be considered to come under the "or otherwise" phrase, as described above, there was another class of amounts which might have been included in that phrase.

It must be recalled that after the downfall of the Kerensky Government, before the Soviets consolidated their position and brought under their control the territory which they have since dominated, there was a period during which various local and independent governments were set up, such as the Omsk All Russian Government, as to which the Court of Appeals said:

> "It is a matter of common knowledge and the moving papers establish the fact that if the Omsk All Russian Government was at any time even a *de facto* government in the international sense, it was created as such with Admiral Kolchak at its head at Omsk in November, 1918, and recognized by General Seminoff and his force at Vladivostok,

and thereafter driven out of all regional control by the Bolshevik government, not later than March, 1920.

"During its ephemeral and disastrous career, it asserted its authority over a portion of the inhabitants of the former Russian Empire who had, after the debacle, separated themselves from the central government and established an independent sovereign government over a limited territory in Siberian Russia. It was not a subordinate state nor a civil division of the Soviet Republic." (*Nankivel* v. *Omsk All Russian Government*, 237 N. Y. 150, at 156.)

Of course, the Soviets would not want to recognize such pretended governments as these in the sense in which they were willing to acknowledge the Imperial and Kerensky Governments, as "prior" governments. Yet they would not be content to waive claim to any assets the pretended governments might have here. It was probably also to cover such claims without acknowledging these sporadic "governments" as "prior" governments, that the words "or otherwise" were inserted in the assignment. Nationalization of private corporations was never meant to be included thereby.

(2) The second half of Mr. Litvinoff's letter negatives the Petitioner's contention.

The latter half of Mr. Litvinoff's letter reads:

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its na-

tionals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

This is an unusual undertaking. What could have been its purpose? To one familiar with the situation of Russian litigation at the time it is entirely clear. Let us see what had been taking place during the years elapsed since the formation of the Soviet Government. In these years there had been conducted a vast mass of litigation arising out of the confiscatory decrees which, it is submitted, are unprecedented in the world's history. In every country it had become necessary to bring litigation to test the effect of the Soviet decrees to see how far they affected the rights of creditors, shareholders and others interested in Russian corporations. Most of the American litigation had taken place in New York where the bulk of the Russian corporate assets were situated. The Court of Appeals of the State of New York had repeatedly passed on various phases of the Russian situation. Some of these cases which may give a picture of the involved legal situation and type of questions dealt with may be found in the following:

Sokoloff v. *National City Bank*, 239 N. Y. 158;
Petrogradsky M. K. Bank v. *National City Bank*, 253 N. Y. 23;
Severnoe Securities v. *Westminster Bank*, 214 App. Div. 14;
Lewine v. *National City Bank*, 248 N. Y. 365, rearg. gr. 248 N. Y. 656, aff'd 249 N. Y. 528;

Friede v. *National City Bank*, 250 N. Y. 288;
McCarthy v. *Culkin*, 254 N. Y. 328;
Sliosberg v. *New York Life Ins. Co.*, 244 N. Y. 482;
Severnoe Sec. Corp. v. *London & Lancashire Ins. Co.*, 255 N. Y. 120.

Liquidation proceedings had been brought in the case of nearly every Russian Insurance Company which had a branch and property in New York, and these litigations, after an enormous amount of effort, had been taken to the Court of Appeals and decisions had been obtained from that tribunal.

Andre v. *Beha*, 211 App. Div. 380, 240 N. Y. 605;
First Russian Insurance Co. v. *Beha*, 240 N. Y. 601;
Russian Reinsurance Co. v. *Stoddard*, 240 N. Y. 149;
Matter of People, Russian Reinsurance Co., 255 N. Y. 415, 423;
Matter of People, Northern Insurance Company, 255 N. Y. 433;
Matter of People, Second Russian Insurance Co., 255 N. Y. 437;
Matter of People, First Russian Insurance Co., 255 N. Y. 440.

Certain principles as to the liquidation of Russian corporations and the rights of creditors, shareholders and directors had been fixed.

The Court of Appeals, in the cases of the several Russian insurance companies had issued decrees instructing the Superintendent of Insurance and the various litigants before it as to what should be done.

Hundreds of actions were pending against the First Russian Insurance Company, the Second Russian Insurance Company and other insurance companies and banks.

Undoubtedly it was intended by the contracting parties that all of this litigation and effort should not be further confused and perhaps go for naught by reason of the injection into the situation of any question as to the retroactive effect of recognition of the Soviet Government. In other words, it was to avoid precisely the contention which the petitioner now makes, that the second half of Mr. Litvinoff's letter was drawn up.

If it had been intended that the Soviet Government was to assign to the United States in the first paragraphs of Mr. Litvinoff's letter, not only the moneys standing to the credit of the Russian Government as such, but also the moneys belonging to Russian corporations or nationals here, there would be no sense in the Soviet Government agreeing, in the last paragraphs, "not to make any claim with regard to property or rights which the Soviet nationals had or may claim to have" because the Soviet Government would already have made an assignment of such property and rights to the United States and it could make no further claim to them.

Viewed in the light of the law and facts, existing at the time of recognition, Mr. Litvinoff's letter is clear.

In the first part he assigned Russian Government claims, whether standing in the name of a prior government, of one of its attaches, or of a pretended government.

In the last half he covenanted that the Soviets would not attempt to use recognition to inject themselves and their laws into the litigation pending and to be brought

over rights and properties of Russian nationals situate here. Or put another way, that the retroactive effect of recognition would not be advanced to disturb rights and principles involved in disposition of Russian private property situated here. As is said by Mr. Hartwell Cabell in his brief for Assecuranz Union, Intervenor herein, at page 17:

> "The Soviet Government has ratified and legalized the disposition of these funds by the Courts of this Country."

Such also is the disinterested opinion of students of international law. The editor of the American Journal of International Law,* January, 1934, speaking of the last part of Mr. Litvinoff's letter, said:

> "This last stipulation is apparently intended to obviate legal difficulties which might otherwise arise on account of the retroactivity of recognition which in law relates back to the date of the origin of the recognized government, thus legalizing all intermediate acts of that government."

In *State of Russia* v. *National City Bank*, 69 Fed. (2nd) 44, the Court in speaking of the assignment, said:

> "Moreover, it is apparent that the intent was to assign all the claims of the Soviet Government to the United States, and it agreed to leave undisturbed diplomatically final non-appealable judgments and decrees of the American courts touching Russian affairs and non-judicial acts done in good faith by and with the officials of the previously recognized government of Russia, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

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* Mr. Chandler P. Anderson, at present American Commissioner on the Mixed Claims Commission, United States and Germany.

(3) Under the rules of construction of diplomatic instruments the assignment cannot be construed as petitioner contends.

The construction of the Litvinoff assignment urged by petitioner would mean the destruction of the rights of creditors and shareholders of the nationalized corporations in their property here and would injure in this way not only Russians but other friendly aliens and American citizens who have claims and judgments against those corporations, and no other source of collection.

It is a fundamental principle of law that, in the case of diplomatic assignments between nations, private property of nationals of the assignor government always will be recognized and protected (*U. S.* v. *Percheman,* 7 Pet. 51, 87; *Strother* v. *Lucas,* 12 Pet. 410, 438; *Coffee* v. *Grooves,* 123 U. S. 1, 9; *Kinkead* v. *U. S.,* 150 U. S. 483).

When treaties are negotiated between nations, private rights remain the same as before (*Chicago, R. I. & P. Ry. Co.* v. *McGlinn,* 114 U. S. 542, 546; *Vilas* v. *City of Manila,* 220 U. S. 345). Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals (*Sullivan* v. *Kidd,* 254 U. S. 433, 439). Nor can a treaty change the Constitution or be held valid if it be in violation of the Constitution (*The Cherokee Tobacco,* 11 Wall. 616, 620-621; *In re Beale,* 2 Fed. Supp. 899, aff'd 71 Fed. (2nd) 737.

> "No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require." (*Strother* v. *Lucas,* 12 Pet. 410, 438, *supra.*)

> "The King cedes that only which belonged to him * * * Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world." (*U. S.* v. *Percheman*, 7 Pet. 51, 87.)

(4) Petitioner's construction would be contrary to the attitude heretofore taken by the petitioner to protect American claims against the Soviet Government.

If petitioner's interpretation of the Litvinoff assignment is correct, Soviet diplomacy will have succeeded in attaining a result *which it attained with no other creditor of Russia*—namely in inducing the United States to take an assignment of alleged Soviet moneys in this country and to sue for such moneys in the United States courts making the American nationals which hold the same defendants in the actions. Thereby Soviet diplomacy will have succeeded in making the United States assume the Soviet position with regard to confiscatory decrees in the United States courts. Should the United States be successful in the present litigation it will in that very process have validated through the judgments of its own courts the Soviet confiscatory decrees and will have furnished for Soviet diplomacy a defense against the $400,000,000 of American private claims which may for all practical purposes be conclusive internationally.

In order to appreciate how this result may be accomplished and how great is the danger thus threatened to American interests, it may be well first to examine the principle of sanctity of private property which the United States has heretofore maintained as a fundamental principle of international law.

Principle of Inviolability of Private Property

Both for peace-time and for war-time, the rule has been gradually established that the private property of aliens, even enemy aliens, is entitled to the protection of the laws of the state having territorial jurisdiction, and must be made the subject of compensation if taken. In the *Matter of the Delagoa Bay Railway,* Secretary Blaine instructed the American Minister at Lisbon, November 8, 1889 (2 Moore International Arbitrations, p. 1869):

> "Upon full consideration of the circumstances of the case, this Government is forced to the conclusion that the violent seizure of the Railway by the Portuguese Government was an act of confiscation which renders it the duty of the Government of the United States to assert that compensation should be made to such citizens of this country as may be involved."

Again and again in cases involving the confiscation of contractual rights the United States Government has insisted upon compensation for its citizens; examples are set forth in 6 Moore's International Law Digest, § 997. The United States regarded it as immaterial that injury to a private property right was effected by legislation of the offending country. As Secretary Bayard wrote to the American Minister at Columbia (October 13, 1886, 6 Moore's International Law Digest, § 1034):

> "It is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subject * * *"

Where the oil legislation of the Mexican Government threatened to interfere with proprietary rights of American citizens owning land in Mexico, the United States Government was emphatic in insisting upon the proprietary rights of its nationals. Secretary Hughes said in October, 1922 (American Foreign Relations, 1931, p. 143):

> "We are not insistent on the form of any particular assurance to American citizens against confiscation, but we desire in the light of the experience of recent years the substance of such protection."

Even in time of war international law recognizes the inviolability of private property from confiscation. *U. S.* v. *Percheman,* 7 Peters 51, 87 (1833). This principle has now been so generally established that, in the opinion of Hall (International Law, 1917, § 144) enemy property "may be said to enjoy a practical immunity from confiscation."

Presumably there is no intention on the part of the United States to abandon this well-established rule of the inviolability of private property, in the single case of the Soviet Union and Soviet confiscatory decrees. In the past certainly the United States has insisted upon the binding character of this principle so far as concerns the rights of American nationals against Russia.

On December 6, 1923, President Coolidge speaking of recognition said in his message to Congress:

> "Our Government does not propose, however, to enter into relations with another regime which refuses to recognize the sanctity of international obligations."

Nothing in the present policy of the Department of State, so far as we know, indicates a purpose to abandon either as to Russia or as to any other country the established principle of the inviolability of private property as the basis for the satisfaction of claims of American nationals. The only difference between the position taken by Secretary Hughes in 1924 and that taken by Secretary Hull in 1933 was that the former insisted upon compensation for American nationals as a prerequisite of recognition, while the latter was ready to extend recognition first and discuss compensation subsequently. The very terms of recognition show that a prompt settlement of claims and counterclaims was anticipated.

Destructive Effect on This Principle of Litigation Under the Litvinoff Assignment

The great success of Soviet strategy appears in that the very principle of inviolability of private property, which has hitherto constituted a barrier against the recognition of Soviet confiscatory decrees, is now being attacked by the United States itself. Its briefs on the appeal below illustrate how fully the Soviet Government is succeeding in persuading the United States to adopt its position in the American courts and to endeavor to validate here its acts of confiscation. At pages 24 and 25 of its main brief, filed in January, the United States Government told the Circuit Court of Appeals:

> "* * * The decrees of the Soviet Government acted upon its corporations in Russia to transfer all of their personal property. Validity of those decrees must be admitted."

On the score of public policy the United States Government fully adopted the Soviet position, at pages 27-8 and 29 of this brief:

> "The decrees of the Soviet Government nationalizing insurance companies are not subject to the general condemnation of confiscatory decrees of a purely political nature which fall with discrimination upon a single group of individuals. * * * The United States having recognized the Soviet Government its courts will not deny the Soviet laws their proper effect * * *.
>
> * * * * * *
>
> "Furthermore, the fact that in the present case the public order of a friendly foreign power and its diplomatic relations with the domestic sovereign are involved puts an entirely different face upon the problem and renders it quite impossible for the courts to defeat the asserted right on the grounds of public policy."

At page 31 of the same brief the United States flatly put its claim of public policy with respect to Soviet confiscatory decrees upon the basis of the Litvinoff assignment:

> "In the absence of Congressional action in the field of foreign relations, the executive branch of the Government is the proper organ of sovereignty to determine public policy. Having accepted the assignment within the scope of executive power, the executive branch has determined the public policy applicable in the present case. Consent to the operation of Soviet decrees on property in the United States of nationalized Russian corporations is granted by the acceptance of the assignment."

The petitioner went so far as to assert that the very fact of its having instituted the actions itself made the Soviet confiscatory decrees a part of American public policy (p. 30):

> "Finally, this claim is asserted by the domestic sovereign and public policy never has and cannot constitute a defense to a suit by the sovereign of the forum. Institution of the suit determines that public policy is not offended."

These arguments had not prevailed below. They were not adopted by the majority of the Circuit Court of Appeals. But the adoption of the Soviet confiscatory decrees by the United States was successful to the extent of persuading Judge MANTON, who dissented, to take the governmental view of those decrees (77 F. 2, 866). At pages 876-7 he said:

> "Is the confiscatory legislation of a recognized government, which produces effects only within its own jurisdiction, and respecting its own nationals *or foreigners*, per se, against public policy? Certainly not * * *
>
> * * * * * *
>
> "Is such legislation against public policy if it seeks extraterritorial application? * * *
>
> "* * * The known practice of the executive department of the nation pronouncing the public policy of the nation should be controlling upon the courts in such instances.
>
> * * * * * *
>
> "The act of recognition of a foreign government may import the equivalent of a definite declaration of policy which the courts would be bound to notice."

Further, at page 878, Judge MANTON said:

> "When, therefore, the Soviet Government was recognized, the courts lost all right to continue to inject their prerecognition conceptions of public policy into the international panorama in manifest derogation of the express determination of the political department and the clear juridical implications of the act of recognition. * * *
>
> "Recognition changes a policy of official disfavor into an attitude of graceful acquiescence. To impeach this legislation now in the courts as being against our public policy would clearly trench upon the sphere of the executive who has already decided the matter in a manner that concludes our courts."

While Judge MANTON puts his conclusions as a consequence of the executive act of recognition itself, it is clear that the result is in reality due to the act of the United States in urging petitioner's interpretation of Mr. Litvinoff's assignment and seeking to enforce it in the Unted States courts by arguments of public policy which constitute a full adoption of the revolutionary theory of property rights, a wholesale acceptance of the confiscatory decrees of Soviet Russia, and a negation of our established tradition of the inviolability of private property.

If that consummation is attained, it will surely mark the triumph of the diplomatic technique which gave birth to the assignment, and mark in addition the first important confirmation outside Russia of the peculiar public policy of the Soviet Union.

But in the process the United States may from the international point of view have dealt a mortal blow to the American private claims; for we cannot conceive that

any effective distinction can be drawn in diplomatic negotiation or international law between the validity and propriety of Soviet confiscatory decrees as they affect the physical and intangible property of American citizens in Russia and the validity and propriety of those same or similar decrees as they affect the property of Russian nationals located in the United States. If the Supreme Court shall at the instance of the United States Government declare it a part of American public policy as established by the acts of the political department in accepting and enforcing the Litvinoff assignment, that the latter class of confiscatory decrees shall have the force of law in the United States, we cannot conceive the possibility of the United States ever extracting from Soviet Russia an acknowledgement of liability with respect to the operation of the former class of confiscatory decrees.

No other country which has recognized Soviet Russia has allowed itself to be put by the Soviet diplomats in this position. No other country has urged in its own courts Soviet public policy as its own public policy.

In the interpretation of diplomatic as well as of other documents, the courts will consider public interests, public policy and the protection of private rights. We are confident they will not give to this assignment a construction which will vitally wound the far-reaching American policy involved in the principle of inviolability of private property in International Law.

POINT III

The Supreme Court of the State of New York having acquired jurisdiction over the funds in question, the District Court is without power to interfere with or enjoin the pertinent proceedings therein.

Let us consider how the funds in the three instant proceedings are being held:

First.—In the case of the *Bank of New York and Trust Company.* Here, the respondent is holding the funds pursuant to an order of the Court of Appeals (*Bank of New York,* R. 23). Based upon the provisions of this order, another suit has been started (*Bank of New York,* R. 12) to obtain a judicial determination for the disposal of the funds. In this suit the Supreme Court of the State of New York has appointed a referee, who has taken testimony bearing on the validity of claims against the Moscow Fire Insurance Company. He has reported to the Court and a judgment has been entered on his report providing for the payment of these funds to various claimants. Execution has been issued by some of these judgment-creditors.

Second.—In the case of the *Bank of the Manhattan Company,* the respondent is holding the funds of the Northern Insurance Company of Moscow as an assignee for the benefit of creditors, pursuant to the provisions of the New York State Debtor and Creditor Law (*Manhattan,* R. 12) and pursuant to an order of the Court appointing it as the agent of the Northern Insurance Company of

Moscow. It has advertised for claims, marshalled its assets, taken proof and filed with the Court its final account as assignee (*Manhattan,* R. 12-13). The New York Supreme Court has appointed a referee to take and state such assignee's account and hear objections. The referee has taken proof of some of the claims and has filed a report covering some of them, and is now examining the others (*Manhattan,* R. 13). His report will ultimately come before the State Court for confirmation. Following such confirmation, a final judgment will be entered in the State Court.

Third.—In the case of *Louis Pink, Superintendent of Insurance,* the funds of the First Russian Insurance Company are being held by the respondent in his official capacity, acting under order of the Court, which is wielding power granted to it by State Statute in the premises (Insurance Law of the State of New York, Section 63). In this case the Superintendent of Insurance has taken proof of claims of creditors of the First Russian Insurance Company, has filed with the Court his Fourth Report, allowing some of these claims and rejecting others, a referee has been appointed by the Supreme Court of the State of New York to pass on objections to the report and in turn report to the Court. The referee has for a period of over a year taken such testimony, his hearings are concluded and his report will soon be handed to the State Supreme Court for confirmation, and the entry of judgment for the disposition of the funds pursuant thereto.

It would be difficult to imagine three clearer cases of the assumption by the State Court of jurisdiction over the three funds in question. In each case, the respondent

has received the fund pursuant to State Court order, and officers of the State Court, to wit, referees, are passing upon validity of claims against the debtor companies.

Yet, in its brief, petitioner claims that these are merely actions *in personam* (Petitioner's brief, p. 70, *et seq.*).

Again, the petitioner is driven to contend that the instant suits in the District Court are also suits *in personam*, and cites cases such as

> *Waterman* v. *Canal-Louisiana Bank Company*, 215 U. S. 33;
> *Riehle* v. *Margolies*, 279 U. S. 218;
> *Allen* v. *United States*, 285 Fed. 679;
> *Brown* v. *Duffin*, 13 Fed. (2d) 708.

These cases have been ably distinguished in the brief submitted on behalf of respondent Bank of New York, pages 53-54. Nothing would be served by repetition here.

Suffice it to say, that in the cases cited by the petitioner, and all similar cases that we have been able to find, the proceedings in the second court were *in personam*, because the purpose of such proceeding was merely to ascertain the extent, if any, of the plaintiff's claim for the purpose of filing such claim in the proceedings in and submitting to the jurisdiction of the court which had first taken hold of the *res* and was administering it. In none of these *personam* cases cited by the petitioner was any attempt made by the plaintiff to interfere with, limit, or disturb the possession of the first court or the exercise of jurisdiction by it.

But such suits have no rememblance at all to the instant suits brought by petitioner. They are not brought to obtain a *personam* judgment which in turn will be the

basis of the filing of a claim in and submitting to the jurisdiction of the State Courts. On the contrary, the instant suits are brought to seize all of the funds in the jurisdiction of the State Courts. They deny that the State Courts have any jurisdiction of the funds, seek to nullify everything that has been done in the State Courts, and last, but by no means least, seek from the District Court an injunction to prevent those acting under State Court jurisdiction from following the directions and carrying out the provisions of State Court orders and judgments (*New York Trust Company*, R. 4). The prayer for relief prays that

> "the defendant herein, its successors, officers, agents, attorneys, employees, or assignees, and all persons or corporations acting under their direction, or in their behalf, be enjoined and restrained permanently and pending the determination of this suit from paying out or distributing to any one other than this complainant any part of the said cash, securities, and other assets or the avails thereof" (*Bank of N. Y.*, R. 4).

We challenge petitioner to cite any case in which an injunction of this nature has been granted by a second court after a first court has taken jurisdiction.

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot

be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice" (*Peck* v. *Jenness*, 7 How. [U. S.] 625).

The "conflict extremely embarrassing" envisioned in *Peck* v. *Jenness, supra,* has already come about, as motions have been made in the State Court against the respondent Bank of New York and Trust Company to enforce the executions of the State Court judgments, which the respondent cannot satisfy because of the restraining order in the District Court.

A similar situation arose in the case of *Matter of Bean* v. *Stoddard,* 207 App. Div. 276. In that case, N. S. Bean, as receiver of the First National Bank of Warren, Mass., applied *ex parte* to a Justice of the New York Supreme Court for leave to bring an action in the District Court of the United States against Francis R. Stoddard, Jr., as Superintendent of Insurance, who by virtue of an order of the Supreme Court was acting as liquidator of the Niagara Life Insurance Company. The petition was granted and an order made permitting such action to be brought, and requiring the Superintendent and another to submit to the jurisdiction of the United States District Court. The Appellate Division said:

"The Attorney-General moved at Special Term on behalf of said Superintendent to vacate the

order, and the motion was denied. An appeal has been taken from both orders. * * *

"It appears that the Massachusetts bank was the owner of certain bonds. These were stolen * * * Some of the bonds were offered to the Niagara Life Insurance Company * * * The petitioner claims that the insurance company never acquired any title to the stolen securities * * *

"It was shortly subsequent to this transaction that the Superintendent of Insurance, pursuant to section 63 of the Insurance Law, was put in possession of the property of the insurance company, then insolvent. The order authorizing liquidation further provided that all persons were restrained from bringing or prosecuting any suit against the insurance company or interfering with its assets, or with the Superintendent of Insurance. * * *

"We think it quite clear, even in the absence of statute but under the rule of comity, that the petitioner might not have sued in any other court without leave. Generally speaking, the funds in the hands of the Superintendent are impressed with a trust in favor of all the creditors of the corporation. A foreign court will not and should not entertain jurisdiction (Martyne *v.* American Union Fire Ins. Co., 216 N. Y. 183). When property has come into the hands of an officer or within the jurisdiction of a court, that court has the right to decide every question which occurs in the cause, and no one can take such property from its custody by any process, for this would produce a conflict extremely embarrassing to the administration of justice (Peck *v.* Jenness, 7 How. [U. S.] 612; Peale *v.* Phipps, 14 id. 368; Farmers' Loan, etc. Co. *v.* Lake St. R. R. Co., 177 U. S. 51); other courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is

in the custody of the court which has seized it (Wabash Railroad *v.* Adelbert College, 208 U. S. 38); and such property is withdrawn from the jurisdiction of other courts as effectually as if the property had been entirely removed to the territory of another sovereignty (Palmer *v.* Texas, 212 U. S. 118). This rule extends and applies to strangers claiming that their property was illegally seized by an officer of the court (Freeman *v.* Howe, 24 How. [U. S.] 450). * * *

"By the provisions of section 63 of the Insurance Law, the authority of the Superintendent to take and hold the assets was by virtue of an order of the Supreme Court. * * * The Supreme Court granted an injunction on the application of the Superintendent for the purpose of permitting him to proceed with liquidation without being harassed by suits or claims of policyholders or stockholders. It had the unquestioned right to modify or vacate the injunction in the interest of justice to individuals who had claims distinct from those already stated. We see no reason, however, in this case for inviting conflict of jurisdictions by permitting the action to be brought in another court. The same result could have been reached by permitting the action to be brought in the Supreme Court, which had general jurisdiction over the liquidation proceedings. The policy of our courts is to require such procedure; and to permit a claimant to sue in another jurisdiction is a clear departure from such policy, hardly justified under the facts presented. The petitioner had and should have sought his remedy in the court having jurisdiction over the officer and the funds (Matter of Knickerbocker Life Ins. Co., 199 App. Div. 503; Krippendorf *v.* Hyde, 110 U. S. 276; Covell *v.* Heyman, 111 id. 176). * * *

"While we are convinced, for the reasons stated, that the ex parte order should not originally have

been made, we will content ourselves with modifying it by retaining that part giving leave to sue, but striking out that portion requiring the Superintendent of Insurance and the Metropolitan Life Insurance Company to submit to the jurisdiction of the District Court of the United States. We leave the question as to whether or not that court will retain jurisdiction to its discretion, under the rules of comity already referred to."

Affirmed by the Court of Appeals, 238 N. Y. 618.

There can thus be no doubt in the instant suits that the United States District Court was without jurisdiction and properly dismissed the complaints. We trust, however, that this Court will not only affirm the Circuit Court of Appeals on the question of jurisdiction, but will reaffirm what was said by the learned Judge in the District Court below on the merits of these cases. These suits are brought in defiance of and involve a reversal of everything that our courts, State and Federal, have said on the questions of confiscation and public policy in the whole history of our jurisprudence. They require a violation of the provisions of the Fifth Amendment of our Federal Constitution. They are predicated upon a total disregard of the rights of American citizens and of friendly aliens. They give no effect to the principles of *stare decisis*. To carry its point, petitioner is compelled to resort to contentions such as these:

That the Executive and not the Courts determine public policy in judicial proceedings;

That the Courts are foreclosed from construing the provisions of a treaty of recognition of a foreign government, but must accept the fiat of the Executive thereon;

That the bringing of an action by the United States predicated upon an Executive document is determinative of whether the document is opposed to our public policy and, in fact, of the meaning and effect of all the language therein contained;

That assets which have always been situate in New York, which are obligations of American municipalities and corporations and which call for performance in New York are in contemplation of law really situated in Russia;

That liquidation proceedings in the State Courts to determine the disposition of a specific *res* and in which the Court has appointed Referees, Receivers, Assignees and Depositaries for the possession of the *res*, are in reality only proceedings *in personam*.

It is submitted that suits resting on such contentions should receive at the hands of this Court a permanent and complete quietus.

CONCLUSION

The decree of the Court below affirming the decrees of the District Court dismissing the several bills of complaint should be affirmed.

Respectfully submitted,

SAMSON SELIG,
Amicus Curiae.

SAMSON SELIG,
WILLIAM F. ROCHE,
Of Counsel.

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DEC 17 1935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. 195, 196, 197.

UNITED STATES OF AMERICA,
Petitioner,

—against—

BANK OF NEW YORK AND TRUST COMPANY.

UNITED STATES OF AMERICA,
Petitioner,

—against—

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY.

UNITED STATES OF AMERICA,
Petitioner,

—against—

LOUIS H. PINK.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

AMICUS CURIAE

BRIEF ON BEHALF OF THE NATIONAL CITY BANK OF NEW YORK.

JOSEPH M. PROSKAUER.
Solicitor for The National City Bank of New York.

JOSEPH M. PROSKAUER,
PHILIP A. CARROLL,
OTEY MCCLELLAN,
J. ALVIN VAN BERGH,
Of Counsel.

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AMICUS CURIAE

BRIEF ON BEHALF OF THE NATIONAL CITY BANK OF NEW YORK.

The purpose of this brief is to discuss some of the substantive issues raised on these appeals and various allied problems which have and will arise in connec-

tion with Soviet acts and decrees, and especially in the light of Soviet recognition.

The National City Bank of New York has a vital interest in substantive issues which may incidentally be raised on these appeals and in questions cognate thereto.

It believes that it can be of assistance to the court in attempting to state for the court the problems arising from the now historic fact of the Soviet Revolution and pointing out certain vital distinctions sometimes overlooked by the lower courts.

The decision of the precise issues raised by these appeals will, we sincerely hope, be materially simplified by pointing out what is *not* herein involved,—thereby delimiting the field of actual decision.

Questions Not Discussed in This Brief.

We do not discuss certain questions raised by this appeal, because they are covered by the other briefs filed herein, to wit:

(1) Whether a title or possession previously acquired in a judicial proceeding may be divested by subsequent recognition by the executive branch of our government (*cf. Gelston* v. *Hoyt,* 3 Wheat. at 313).

(2) Whether the decrees of the state court in the present cases are still executory; and if so, to what extent;

(3) Whether, under the specific circumstances presented by these records, the United States may bring new suits in the federal court

under Section 24(1) of the Judicial Code to reach so much of the funds under the control of the state court as has not been distributed by final decree, or whether it should not, out of respect for the state court and in view of the dual nature of the judicial system of the United States, seek such relief in the state court in the first instance (*cf. Pennsylvania* v. *Williams,* 294 U. S. 176; *Gordon* v. *Ominsky,* 294 U. S. 186; *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189).

(4) Whether, and to what extent, the Litvinoff letter operated as an assignment.

Problems Arising From the Russian Revolution.

The Soviet Government, pursuant to its policy of monopolizing all business and acquiring all capital:

(1) Transferred to itself all the capital stock, and cancelled all outstanding shares of stock of certain Russian corporations[1];

(2) "Nationalized" all such Russian corporations; and

(3) Seized the Russian assets of all Russian corporations and of Russian branches of foreign banking and insurance companies, turning such assets over to state institutions, discharging the private companies, and in certain cases giving creditors, in substitution for their former rights against the private companies, certain

---

[1] Many of the decrees as to Russian insurance companies are printed in the record.

The pertinent decrees as to Russian banks and the Russian branches of foreign banks have, we believe, been summarized in the text above.

claims against the state institutions, which claims ultimately became worthless by reason of the depreciation of the ruble.[2]

The assets which the state court has been administering, and which the United States now asks the federal court to administer, are assets which are and always have been in America, and are in large part the result of business transacted in the United States with American nationals.

Attention is called to the fact that many of the questions discussed in this brief, and referred to in other briefs, are not presented by the record before the Court.

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[2] Thus, pursuant to the policy of monopolizing the banking business, the two Russian branches of the National City Bank were taken over and all the assets in Russia seized. These branches had been opened under a license which provided that all contracts made with the branches should be governed exclusively by Russian law, and all assets in Russia were to be treated as security for claims arising out of Russian business. At the time of the seizure, the Russian assets of the Russian branches amounted to 241,000,000 rubles and the ruble deposits in said Russian branches were approximately 231,000,000 rubles, both sums exclusive of securities held for safe-keeping. The Russian assets, therefore, exceeded by 10,000,000 rubles the total amount of Russian obligations. The Soviet decrees provided that the assets of such branches should be turned over to the Soviet People's Bank and that creditors of the branches should be credited on accounts in the People's Bank. Later, some of these accounts were in part reduced by a so-called revolutionary tax. Finally, all of the accounts so transferred were cancelled as worthless by reason of depreciation of the ruble.

The situation with respect to Russian branches of foreign insurance companies was very similar. It is fully described in *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71.

The instant case does not involve the effect of the Russian decrees upon the branches of American corporations domesticated in Russia under Russian laws.

Nor does it involve the effect of the Russian decrees as a defense to actions arising out of contracts made and performable in Russia with such branches domesticated in Russia (*Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71).

It does not even involve the effect of the Russian decrees upon obligations arising out of contracts made and performable in Russia.

Zimmerman v. *Sutherland*, 274 U. S. 253, 256;
Security Savings Bank of California, 263 U. S. 282, 285;
In re Russian Bank of Foreign Trade [1933], 1 Ch. 745, 766;
Restatement of the Conflict of Laws, Sec. 385.

See also:

Williams v. *Brophy*, 96 U. S. 176, 189;
Planters Bank v. *Union Bank*, 16 Wall. 483, 495;
Ware v. *Hylton*, 3 Dallas 568, 582.

Nor does it involve the effect of the Russian decrees upon obligations arising out of contracts made and performable outside of Russia with a Russian corporation (*cf. Canada Southern Ry.* v. *Gebhardt*, 109 U. S. 527, and *Second Russian Insurance Co.* v. *Miller*, 268 U. S. 552).

It involves merely a *problem of administration of "derelict" assets*[3] in the United States of a "nationalized" Russian insurance company.

The field of inquiry in the instant appeals is further delimited by analysis of the nature of the claims which are or may be asserted against these "derelict" assets.

Against the "derelict" funds in the present cases, no claims arising out of business done or contracts made in America are asserted (other than the alleged claims growing out of the administration of the fund itself). The fund has already satisfied all such claims, and no one does or could secure priority over such claims.

The Government's position below was merely that it was entitled to the fund as against former stock holders of the dissolved Russian corporations, and that, as against claims arising out of Russian or other foreign business, it has sufficient interest in the fund to bring it into this court for its administration, postponing until final decree herein any question as to the validity of such claims against the fund.[4]

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[3] A "derelict to be moored while it could be seized lest the tide carry it away" (*Serernoe Securities Co.* v. *L. & L. Ins. Co.*, 255 N. Y. at 123).

[4] The distinction is clearly made in *Issaia* v. *Russo Asiatic Bank* (266 N. Y. 37), where the Court discussed the procedural question as to how New York should administer New York assets of a nationalized Russian bank, but refused to consider as premature whether that plaintiff (asserting rights arising out of a contract made in Russia) might be entitled to share in the fund.

Similarly, in *In re Russian Bank for Foreign Trade* [1933], 1 Ch. 745, the English Court undertook to liquidate English assets of a Russian Bank despite its belief that *strictissimi juris* the petitioning creditor's claim had ceased to exist as a result of Soviet legislation.

No one disputes the power[5] of Russia to confiscate assets situated in Russia and to affect title to deposits localized there, irrespective of the nationality of the plaintiff or defendant.

Ricaud v. *American Metal Co., Ltd.*, 246 U. S. 702;
Oetjen v. *Central Leather Co.*, 246 U. S. 297;
Luther v. *James Sagor & Co.* [1912] 3 K. B. 532;
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In re Russian Bank for Foreign Trade [1933], 1 Ch. 745, 766;
New York Life Ins. Co. v. *Public Trustee* [1924], 2 Ch. 101.

This question is, however, not involved on the present appeal. We have here deposits unquestionably situated in New York over which the law of the situs has paramount jurisdiction.

Security Savings Bank v. *California*, 263 U. S. 282 at 285;
Rex v. *Lovitt* [1912], A. C. 212, 218, 219;

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[5] Of course, our government through diplomatic channels, may well object to such a confiscation and demand compensation on behalf of its nationals, but the power of a sovereign to confiscate property cannot be questioned in civil litigation.

[6] Reargument, based on the ground that citizens of countries other than Russia were involved, was denied (266 N. Y. 615).

Richardson v. *Richardson* [1927], 43 T. L. R. 631, 633;

Pan American Bank & Trust Co. v. *National City Bank of New York*, 6 Fed. (2d) 762, 767, cert. den. 269 U. S. 554;

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Dougherty v. *Equitable Life Assur. Soc.*, 266 N. Y. 71;

Treaty on International Commercial Law of Montevideo, Art. 6 (1889), cited in dissenting opinion below 77 Fed. (2d) at 878.

It may be that, under certain circumstances, the law of the situs may, as a matter of comity, be willing to recognize Russia as the successor of the dissolved Russian corporations but, if so, Russia and the United States, as its assignee, must take the American assets *cum onere*, subject to whatever claims existed against the Russian corporations.

This question, while not involved on the present appeal, will be involved in other cases arising from the Litvinoff letter. Many of these Russian corporations had deposits in banks to which they owed large sums.

It is submitted that anyone claiming these American assets as successor of these corporations must be subject to the same counterclaims as would the corporation itself.

Where the only question involved is the succession of title to local assets, the position of a foreign statutory successor "is no better than that of the dissolved corporation to whose title he has succeeded. * * * He

must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession" (*Clark* v. *Williard*, 294 U. S. at 214; see also *Disconto Gesellschaft* v. *Umbreit*, 208 U. S. 570; *Sutherland* v. *Selling*, 16 F. [2d] 865, 868).

Conceding the power of the Russian government over assets and business localized in Russia, that power cannot be invoked in an American court so as to defeat the claims of American nationals against such American assets.

If the Soviet acquired any interest in the American assets, it took *cum onere* as to the claims of American nationals against such derelict assets (*United States* v. *The Thekla*, 266 U. S. 328; *State of Russia* v. *National City Bank*, 69 F. [2d] 44; *The Gloria*, 286 Fed. 188, 193-194; *United States* v. *McRae*, L. R. 8 Eq. 69; *Priolean* v. *United States*, L. R. 2 Eq. Cas. 659, 663-664).

The United States, as assignee, could demand no more without transgressing its constitutional powers (See *Henkels* v. *Sutherland*, 271 U. S. at 301, 302).

Respectfully submitted,

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v.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY.

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York.

BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK AS *AMICUS CURIAE.*

JOHN W. DAVIS,
Attorney for Guaranty Trust Company of New York as *Amicus Curiae.*

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BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK AS *AMICUS CURIAE*.

Consent of the Parties.

This brief is submitted upon the written consent of the parties to these appeals, filed with the clerk of this Court. Guaranty Trust Company of New York is a defendant in an action brought by the United States involving the question here discussed.

The Question Presented.

This brief is confined to the question raised on the present appeals of the effect to be given within the United States to confiscatory decrees of the Soviet Government. From that Government, at the moment that it became in contemplation of our law an international person by the act of the Executive in according recognition to it in the ordinary conduct of foreign relations, the United States took an assignment of "the amounts admitted to be due or that may be found to be due it [the Soviet Government], as the successor of prior governments of Russia, or otherwise, from American nationals."

The United States is now asserting through the courts, in the present and in other actions, title by virtue of this assignment to debts and evidences of debt held within the territory of the United States by American nationals for Russian nationals, prior to November 7, 1917. Such assertion of title rests essentially upon the contention that Soviet law transferring the ownership and right of possession of the property of Russian corporations from them to the Soviet Government, is effective as to these debts and evidences of debt owed and held by American nationals within the United States, to the same degree as if they were tangible property situated within Russia. The record fairly exhibits the exact quality of the Soviet law so invoked, in its operation within Russia, as representing the extreme application of power available to a territorial sovereign. The property of the former owners was "confiscated and appropriated" (R. 3), i. e., attempted to be transferred to the State by force and without recompense.

The contention of the United States in this regard is so novel, and the decision of this Court thereon is so important, not only in this and other cases involving substantial sums but in the foreign relations of this country, that we trust this Court will deal with it explicitly.

1. The Application of Foreign Law Herein Sought Is Truly Extra-Territorial.

The United States' claim of title upon the basis of Soviet law governing Russian nationals and their property, to debts and evidences of debt owed and held by American nationals within the United States, rests finally upon the thesis that Soviet law operates upon property situated outside its proper area of power.

This is not conceded to be so by the United States, which in its brief asserts that the property here in question must be deemed situated in Russia (pp. 42-4). But the cases cited in support of this assertion do not support it, for the reason, pointed out by the respondents (e. g., brief of Bank of New York & Trust Co., pp. 11-12), that the fiction *mobilia personam sequuntur* as applied by this Court in those cases to the question of jurisdiction to tax intangibles turn precisely upon the point that the tax is upon the privilege of succession, not upon the property itself. *Blodgett* v. *Silberman,* 277 U. S. 1 at 8; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204 at 214. Thus the operation of the maxim *mobilia personam sequuntur* to sustain the tax in those cases is in reality permissive as to the owner of the property, not *in invitum.* Moreover, its fictional basis is well recognized in this Court, which employs it in accordance with "the demands of convenience and justice" (*Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 92) and will, when the demands of convenience and justice point elsewhere, refuse to follow the maxim to a conclusion otherwise logical. *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 93.

The fact, therefore, that debts and evidences of debt owed or held by American nationals in the United States might properly be taxed upon succession at death at the domicile of the creditor or owner, and would for such purpose be treated as "localized at the creditor's domicile" (*Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. at 211), cannot abstract them from the necessary operation of the territorial

law of the place where they are payable or deliverable. It cannot obscure the fact that for the application of the Soviet law thereto, in connection with the establishment of the title claimed by the United States, *the aid of the local courts must be invoked.*

So this Court determined in *Baker* v. *Baker Eccles & Co.*, 242 U. S. 394, that the claim of a Tennessee decedent against a Kentucky corporation for surplus profits was localized in Kentucky in such sense that the state of domicile could not by *in rem* proceedings determine the course of its devolution as personal property. Compare *De Ganay* v. *Lederer*, 250 U. S. 376, 382 (taxable situs). Under the law of New York, where the property here in question is deposited, the localization of a bank account at the point of deposit is so clearly recognized that an attachment levied upon the head office of a bank is held not to reach an indebtedness owed by the bank to the attachment debtor in the form of a deposit established with and repayable at a branch outside New York. *Bluebird Undergarment Co.* v. *Gomez*, 139 Misc. 742, following *Richardson* v. *National Bank of India*, 43 T. L. R. 631.

It may be added that such title as the Soviet Government acquired in Russia to the property there of the former Russian corporations entitled to the property here in question, does not upon this record bear any aspect of a universal succession. The Soviet Government succeeded to no *universitas juris*. Rather it shattered the *universitas juris* in each case. There is no question here of the effectiveness of Soviet law in terminating the existence of the Russian corporations which were subject to its power and existed only by franchises from its predecessor government. The fact of termination under the applicable foreign law has been recognized by the House of Lords in *Lazard Brothers & Co.* v. *Midland Bank*, [1933] A. C. 289, upon principles implicit in the law of this Court ever since *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588, and should, we believe, be recognized and given effect here. But the non-existence of the former corporate owners does not permit the conclusion, without some

further course of reasoning, that their property localized in the United States has been aliened by the same manifestation of power.*

2. The Confiscatory Decrees Underlying the United States' Assertion of Title Do Not Apply *Ex Proprio Vigore* and Should Not Be Extended by This Court.

It is a remarkable fact that the courts generally have recognized and given effect to transfers of title by confiscation with respect to property, tangible or intangible, within the territorial jurisdiction of the foreign confiscatory law—

Oetjen v. *Central Leather Co.*, 246 U. S. 297 (hides in Mexico);

Ricaud v. *American Metal Co.*, 246 U. S. 304 (bullion in Mexico);

Salimoff & Co. v. *Standard Oil Co.*, 262 N. Y. 330 (oil lands and oil in Russia);

Dougherty v. *Equitable Life Assurance Society*, 266 N. Y. 71, 87, 103 (life insurance contract governed by Russian law);

Princess Paley v. *Weisz*, [1929] 1 K. B. 718 (furniture and works of art in Russia);

Luther v. *Sagor & Co.*, [1921] 3 K. B. 532 (mill and lumber in Russia)—

while at the same time denying effect to attempted transfers by confiscatory foreign law with respect to property situated outside the territorial jurisdiction of the law:

The Jupiter, [1927] P. 122, 250 (ship at Odessa during French occupation);

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* The New York Court of Appeals did treat the two questions together and in the same way where they were presented in the same allegation of a pleading. *Vladikavkazsky Railway Co.* v. *New York Trust Co.*, 263 N. Y. 369. But the same Court has more recently intimated that, when the question of the continued existence of the Russian corporate owner is properly presented, it will decide it in the negative. *Israia* v. *Russo-Asiatic Bank*, 266 N. Y. 37, 43.

Etat Russe v. *Ropit,* 52 Clunet 391, 53 Clunet 667, 55 Clunet 674 (ships at Marseilles);
Vladikavkazsky Railway Co. v. *New York Trust Co.,* 263 N. Y. 369 (bank deposit in New York);
In Re Russian Bank for Foreign Trade, [1933] 1 Ch. 745, 767 (debt recoverable in London);
Sedgwick Collins & Co. v. *Rossia Insurance Co.* [1926] 1. K. B. 1, 15, affirmed [1927] A. C. 95 (debts payable in England);
Lecouturier v. *Rey,* [1910] A. C. 262 (trade marks registered in England).

Thus, having regard to the authority accumulated upon the subject, this Court might conclude that Soviet law is ineffective as to the debts and evidences of debt here involved simply because it can have no real or physical operation thereon. In two decisions this Court has adumbrated such a conclusion. *Baglin* v. *Cusenier Co.,* 221 U. S. 580, held that French law dissolving the congregation of the Chartreux and taking possession of the properties of the order in France, where the Chartreuse liqueur had been manufactured for hundreds of years, did not divest the title of the order to a trademark for the product registered in the United States. The Court found that the French law (p. 596)

> "cannot be conceived to have any extra-territorial effect to detach the trademarks in this country from the product of the Monks, which they are still manufacturing."

Mr. Justice Hughes then quoted with approval the language of Lord MacNaghten in *Lecouturier* v. *Rey,* [1910] A. C. 262, 265:

> "To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market."

Again in *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552, 560, this Court held that a Russian ukase forbidding commercial relationships between Russian subjects and German subjects had no effect upon a contract between a Russian insurance company and its New York agent whereby certain reinsurance commissions were segregated for the benefit of German agents.

In both these cases this Court seems to have delimited the application of foreign law along the lines of territorial jurisdiction as the measure of the potential application of force. The distinction is to be noted between these cases and *Canada Southern Railway Co.* v. *Gebhardt,* 109 U. S. 527 (operation of law of the corporate domicile upon internal relations of the corporation), and *Direction der Disconto-Gesellschaft* v. *U. S. Steel Corporation,* 267 U. S. 22, 28 (operation of foreign law upon a stock certificate situated within the jurisdiction).

But a further and positive reason exists against the extension of Soviet law to affect the title to the property here involved, through the instrumentality of our courts applying conflict-of-laws principles. That is the public policy of the forum, which, wherever truly extra-territorial effect has been sought to be given to Soviet law, has been found to be decisive against it. Public policy is a doctrine for the protection of the state interest. 1 Beale on the Conflict of Laws (1935) p. 59.

One of the highest state interests of this country is the principle, embedded in the Fifth and Fourteenth Amendments, that private property shall not be taken for public use without compensation. The United States has sought not only to apply this principle internally but to incorporate it into the body of international law.

United States v. *Percheman,* 7 Pet. 51, 86-7 (1833);
Hyde, International Law, § 622;
Delagoa Bay Railway case, 2 Moore International Arbitrations 1865, 1869.

In the recent controversy on the Mexican land laws, the Secretary of State in his note to Mexico dated July 31, 1926, laid down the following bases for the American case (21 American Journal of International Law 294-5):

> "First. Lawfully vested rights of property of every description are to be respected and preserved in conformity with the recognized principles of international law and equity.
>
> * * * * * * *
>
> Third. The principle of international law that it is both the right and the duty of a government to protect its citizens against any invasion of their rights of person or property by a foreign government, and that this right may not be contracted away by the individual is conceded.
>
> Fourth. The principle that vested rights may not be impaired by legislation retroactive in character or confiscatory in effect is not disputed."

This long-settled and paramount policy of the United States in foreign relations could not but be greatly shaken and impaired by a decision of this Court that the devolution of title to the United States upon a basis of sheer confiscation is in accord with the public policy of the forum. By such a finding the very claims whose settlement is contemplated in the exchange of notes between the President and the Soviet Commissar for Foreign Affairs dated November 16, 1933, might be destroyed internationally. For after the rendition of such a judgment at its own solicitation by the highest court of the Union the United States could not reasonably assert that Soviet public policy as represented by the confiscatory decrees diverged from its own policy. After benefiting as an assignee from the fruits of Soviet confiscation, the United States could not well maintain upon the international plane a claim for the property of its nationals taken in Russia by the same decrees.

These considerations conclusively indicate, to our mind, that the public policy of the forum would as a matter of

state interest require this Court to deny effect to Soviet law with respect to the property here involved even if such law could (as it has been shown it could not) take effect *ex proprio vigore*. The ingenious suggestion is made in the brief of the United States (pp. 40, 48) that the public policy determinative of these appeals is fixed by the action of the Executive for this single instance. Such surely can not be the case. Public policy for the purposes of the conflict of laws is settled by the Constitution, the statutes of Congress pursuant thereto, and the course of administration and decision. *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 655. It would be strange indeed if a confiscatory practice denied to our Government by the Constitution in a fashion absolute, not relative (*Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 492), could be made to accord with the public policy of this country, even transiently as an aid in the extension to this jurisdiction of relevant foreign law, by the isolated act of the Executive in the conduct of foreign relations. The constitutional exercise of the executive power to that end can be implemented within this country by the application of foreign law here under our conflict-of-laws rules, *only* in the manner and to the extent permitted by the Fifth Amendment.

The suggestion of the United States as to the determination of public policy for these appeals, therefore, amounts to saying that the United States should have the property in dispute because it wants it, and involves the negation of legal reasoning. In the hands of this Court it must lie to determine what is the real public policy of the country with respect to property rights and whether that policy permits the extra-territorial application of Soviet law to debts and evidences of debt payable or deliverable in the United States.

Respectfully submitted,

JOHN W. DAVIS,
Attorney for Guaranty Trust Company
of New York as *Amicus Curiae*.

p. 6.

SUPREME COURT OF THE UNITED STATES.

Nos. 195, 196 and 197.—October Term, 1935.

The United States of America, Petitioner, vs. Bank of New York and Trust Company. (195)	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
The United States of America, Petitioner, vs. President and Directors of the Manhattan Company. (196)	
The United States of America, Petitioner, vs. Louis H. Pink. (197)	

[January 6, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The United States, claiming to be the owner of certain funds which originally had belonged to Russian insurance companies, brought these suits for accounting and delivery. The companies had made deposits with the Superintendent of Insurance of the State of New York in order to obtain authority to transact business within the State. The complaints alleged that in 1917, or 1918, the companies had been dissolved, and their properties had been "confiscated and appropriated", by decrees of the Russian State. The claim of the United States is based upon an assignment made by the Russian Government, on November 16, 1933, in connection with the recognition of that Government. Defendants hold the funds in question under orders and judgments of the state court in New York, providing for liquidation and distribution.

In each case, defendants moved to dismiss the complaint for insufficiency and, in opposition to complainant's motion for an inter-

locutory injunction restraining distribution, set up the proceedings of the state court. The District Court denied the motions for injunction and dismissed the complaints upon the grounds (1) that the Russian decrees, by reason of their confiscatory character, were ineffective to vest in the Russian Government the title to these funds situated in New York, and (2) that these funds were not covered by the assignment to the United States, 10 F. Supp. 269. The Circuit Court of Appeals held that the jurisdiction of the state court should be respected, and in that view affirmed the decrees of the District Court. 77 F. (2d) 866, 880, 881. Because of the nature and importance of the questions presented, we granted writs of certiorari, October 14, 1935.

The special facts of the three cases are these:

(1) The case against the Bank of New York and Trust Company (No. 195) relates to the deposit made by the Moscow Fire Insurance Company. By order of the Supreme Court of the State of New York, in 1925, the Superintendent of Insurance was appointed liquidator of the United States branch of the company pursuant to section 63 of the state insurance law and creditors were enjoined from pursuing their legal remedies against the assets so sequestered. The Superintendent of Insurance took possession of the assets and proceeded in the course of liquidation to satisfy the claims of domestic creditors and policyholders. There remained a substantial surplus.

Similar results followed the Superintendent's liquidation of the branches of other Russian companies, and the disposition of the surplus assets was brought before the Court of Appeals of New York. Creditors and policyholders with claims arising out of foreign business insisted that the time had come when their claims should be enforcible. The insurance companies insisted that they were still "juristic persons", that they were represented by boards of directors competent to act, and were entitled to possession subject to the remedies of creditors. The court declined to sustain the position of the Superintendent that the surplus should be left in his hands indefinitely,—until the recognition of a Russian government. As the Superintendent had fulfilled the statutory trust, the court considered it to be no part of his duty to ascertain the validity of the claims that would be paid out of the surplus "unless inequity would be done if the claimants were remitted to a remedy at law". Exceptions were recognized where attach-

ments or executions had been levied before the date of liquidation and also where proofs of claim had been filed and diligently pressed while the Superintendent was still in charge and the injunction was still in force. As the creditors so proving were acting in response to an invitation—published in accordance with the order of liquidation—to submit claims of every kind without reference to the place of origin, and were meanwhile stayed, the court thought that there would be manifest inequity if at that late day they were remitted to their legal remedies and compelled to prove anew. A court of equity having assumed control over a fund might continue to grant relief if justice so required. But the court took the view that after the liquidator had made provision for the payment of claims already filed, the surplus then remaining "should be paid to the corporations, represented by directors, a quorum of the board". *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, 420-424.

The Moscow Fire Insurance Company, however, had been left with but one director; and although he might be treated as a "conservator" of the property of his company when there were assets within the State "that might otherwise be lost", the Court of Appeals was of the opinion that a measure of discretion should be exercised by a court of equity "before surrendering possession". Exercising that discretion, the court directed that the delivery of the assets in the case of that company should be conditioned upon the execution of a bond to the People of the State in a sum equal to the value of the assets delivered, with a condition that the director should faithfully apply the assets to the use of the corporation, its creditors and shareholders. In the event of inability or failure to give the bond, the court directed that delivery should be made to a trust company "as agent or depositary" upon the stipulation of the insurance company and its "conservator" that the fund would "not be withdrawn except upon the order of a court of competent jurisdiction". *Matter of People* (*Moscow Fire Insurance Co.*), 255 N. Y. 433, 435. On the remittitur of the Court of Appeals, judgment was entered in the Supreme Court of the State on August 11, 1931, and provided, in the stated alternative, that the Superintendent should deliver the surplus assets to the Bank of New York and Trust Company. The Moscow Company and Paul Lucke, "its sole surviving director and conservator",

took advantage of this alternative and gave the required stipulation, whereupon the Trust Company received the surplus assets, of about $1,000,000, on April 18, 1933.

Immediately—on April 19, 1933—the Moscow Company and Lucke brought suit in the Supreme Court of the State to determine the disposition of these assets, including the determination of the claims of creditors. A second suit was brought in June, 1933, by a shareholder of the Moscow Company. In October, 1933, the first of these suits was referred to a referee to hear and determine, and later the two suits were consolidated. Trial was had before the referee and proofs of claims of various creditors and shareholders of the Moscow Company were submitted. On August 13, 1934, when the referee was about to file his report, the United States Attorney presented to the referee a proof of claim of the United States to the entire fund,—based upon the assignment of November 16, 1933, by the Russian Government. Apparently the claim was not pressed and an understanding was reached that the referee would withhold his report until August 21, 1934, and that the United States would meanwhile determine in what manner it would assert its claim, whether by intervention in a proceeding in the state court or by suit in the federal court. The referee made no mention of the claim in his report, which was filed on August 22, 1934. Judgment was at once entered upon the report directing payment of the claims of creditors as allowed by the referee and, after making reservation for future claims and expenses, ordering the distribution of the residue in liquidating dividends to the shareholders of the Moscow Company. There was also provision that any shareholder, or any party to the action, or successor in interest, might apply at the foot of the judgment for further directions. On the same day the United States brought the present suit.

(2) The case against the President and Directors of the Manhattan Company (No. 196) relates to the Northern Insurance Company of Moscow. Under an order of the state court, in 1926, the Superintendent of Insurance took possession of the assets of the United States branch of the company. The statutory liquidation was completed. But as the company was left with but two directors, provision was made in April, 1931—under the decision of the Court of Appeals of New York—for the delivery of the surplus assets to a trust company, in case the required bond was not given. *Matter of People* (*Northern Insurance Co.*), 255 N. Y. 433, 435.

In the following year an assignment for the benefit of creditors was made on behalf of the Northern Insurance Company to the Bank of Manhattan Trust Company, the predecessor in interest of the defendant in the present suit. Pursuant to a decision of the Court of Appeals on reargument (*Matter of People* (*Northern Insurance Co.*), 262 N. Y. 453) judgment was entered, on June 6, 1933, in the Supreme Court of the State directing the Superintendent of Insurance to deliver the surplus assets to the Bank of Manhattan Trust Company "as agent or depositary" to be held subject to the order of a court of competent jurisdiction. The delivery was made, the amount being upwards of $245,000. On November 13, 1933, the state court directed the President and Directors of the Manhattan Company, as successor in interest, to transfer the fund to itself "as assignee for the benefit of creditors of the Northern Insurance Company of Moscow". In July, 1934, the state court appointed a referee to take and state the account of the assignee, and to take proof and report as to the claims of creditors and those entitled to share in the disposition of the fund. That proceeding was in progress when the present suit by the United States was begun on August 25, 1934.

(3) The third case (No. 197) relates to the assets of the United States branch of the First Russian Insurance Company, which the state court, in 1925, placed in the hands of the Superintendent of Insurance as liquidator. This case differs from the others in that the Superintendent is still in possession. After the payment of domestic creditors, the surplus assets were retained by the Superintendent under the order of the state court for the purpose of satisfying valid claims founded upon foreign business, where proofs of claim had been filed with him during the statutory liquidation. *Matter of People* (*First Russian Insurance Co.*), 255 N. Y. 415, 423. It appears that some of these foreign claims had been allowed by the liquidator and payments on account had been made under orders of the state court, and that other claims which the liquidator had disallowed were being heard before a referee appointed by the state court, when the United States brought the present suit on November 14, 1934. The Government states that the fund then held by the Superintendent amounted to over $1,000,000.

First. When the state court directed the Superintendent of Insurance to take possession of the assets of the United States branches, and to conserve those assets until its further order, the

court took jurisdiction of the *res*. While the Superintendent was a statutory liquidator, he took possession under the direction of the court and the fund was at all times subject to the court's control. The proceeding was essentially one *in rem* and the Superintendent was protected by a sweeping injunction in the unimpeded liquidation of the sequestered property. *Matter of People* (*Russian Reinsurance Co.*) *supra*, p. 420. Under section 63 of the state statute (Insurance Law; Cons. Laws, Chap. 28), the liquidator had rights and duties such as had previously "been exercised by and imposed upon ancillary receivers of foreign corporations". *Id.*, p. 424.

When the statutory trust was satisfied by the payment of domestic creditors and policyholders, it did not follow that the remaining assets were automatically released and the state court was *ipso facto* shorn of its jurisdiction. The court still had control of the property and necessarily had the pertinent equitable jurisdiction to decide what should be done with it. In such a case, the court might direct that the surplus assets should be remitted to a domiciliary receiver—if there were one—on appropriate conditions. *Matter of People* (*Norske Lloyd Insurance Co.*), 242 N. Y. 148. Or the court might direct further liquidation, in order to provide for the payment of other claims, if that course appealed to the sense of equity in the particular circumstances. *Matter of People* (*Russian Reinsurance Co.*), *supra*, p. 423. The latter action was taken and the Superintendent of Insurance was continued in possession of the assets subject to the control of the court. He was virtually its receiver for the purposes specified. In No. 197, the Superintendent still holds possession by virtue of that authorization and the *res* thus remains under the court's jurisdiction.

In the other two cases (Nos. 196 and 197) the Superintendent completed the additional liquidation and turned over the remaining assets to the designated depositaries. To safeguard all rights in the funds, they were not to be withdrawn from the depositaries except upon a court order. We need not pause to inquire as to the effect of that limitation, for, if jurisdiction was relinquished, it was soon resumed. On the very next day, in the case of the Moscow Fire Insurance Company, suit was brought in its name, and by the sole surviving director and conservator, against the depositary and those alleged to be creditors and shareholders of the insurance company, to determine the disposition of the fund. Claims

of creditors and shareholders were in course of adjudication in that proceeding when the present suit was brought. At that time, also, in the case of the Northern Insurance Company, the depositary—which had received an assignment for the benefit of creditors—was accounting in the state court for the fund in its hands and the claims of creditors and of those entitled to share in the fund were being heard.

In both these cases the proceedings in the state court were *quasi in rem*. Control of the funds was essential to the exercise of the court's jurisdiction to protect the rights of claimants. It was not necessary for the court to appoint receivers, as the funds were already in the hands of depositaries appointed by the court and subject to its direction. The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property. *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 61. If the two suits are *in rem* or *quasi in rem*, so that the court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. *Penn Company* v. *Pennsylvania*, 294 U. S. 189, 195. This principle is applied in the discharge of the long recognized duty of this court to give effect to such "methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States". *Taylor* v. *Carryl*, 20 How. 583, 595. See, also, *Peck* v. *Jenness*, 7 How. 612, 625; *Buck* v. *Colbath*, 3 Wall. 334, 341; *Wabash Railroad Co.* v. *Adelbert College*, 208 U. S. 38, 54; *Palmer* v. *Texas*, 212 U. S. 118, 129; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 89; *Harkin* v. *Brundage*, 276 U. S. 36, 43.

The Government urges that the present suits for an accounting are not suits *in rem* but *in personam;* and that to allow the federal court to pass upon the right asserted would not necessarily interfere with the jurisdiction or control by the state court over the

res. See *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 230. But these suits are not to enforce a personal liability but to obtain possession of the respective funds. The suits are not merely to establish a debt or a right to share in property, and thus to obtain an adjudication which might be had without disturbing the control of the state court. Compare *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 44-46; *Riehle* v. *Margolies*, 279 U. S. 218, 223, 224. Complainant demands that the depositaries account and pay over to the complainant, as "the sole and exclusive owner", the entire funds in their hands. Thus the object of the suits is to take the property from the depositaries and from the control of the state court, and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings.

The Government also insists that the courts of the State had lost jurisdiction of the funds, prior to the time when the present suits were begun, by reason of the fact that the funds were the property of the Russian Government which our Government had recognized. But, whatever the effect of recognition, it is manifest that it did not terminate the state proceedings. The state court still had control of the property and questions as to the rights of the parties who were before it, or of those who might come before it, were legal questions which the court had jurisdiction to decide.

Second. The fact that the complainant in these suits is the United States does not justify a departure from the rule which would otherwise be applicable. The Government invokes section 24 (1) of the Judicial Code (28 U. S. C. 41) which confers jurisdiction upon the District Court to entertain all suits of a civil nature brought by the United States. The Government insists that the United States is entitled to have its claim determined in its own courts. But the grant of jurisdiction to the District Court in suits brought by the United States does not purport to confer exclusive jurisdiction. It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive. See *Gettings* v. *Crawford*, Taney's Dec. 1; *Ames* v. *Kansas*, 111 U. S. 449, 464; *Plaquemines Fruit Co.* v. *Henderson*, 170 U. S. 511, 517, 518; *Merryweather* v. *United States*, 12 F. (2d) 407, 409, 410. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States

whenever those rights are involved in any suit or proceedings before them. *Robb* v. *Connolly,* 111 U. S. 634, 637. In this instance, it cannot be doubted that the United States is free to invoke the jurisdiction of the state court for the determination of its claim, and the decision of the state court of any federal question which may be presented upon such an invocation, may be reviewed by this Court, and thus all the questions which the Government seeks to raise in these suits may be appropriately and finally decided. Jud. Code, sec. 237, 28 U. S. C. 344.

The statutory grant of jurisdiction to the District Court leaves open the question of the propriety of its exercise in particular circumstances. Even where the District Court has acquired jurisdiction prior to state proceedings, the character and adequacy of the latter proceedings in relation to the administration of assets within the State, and the status of those assets, may require in the proper exercise of the discretion of the federal court that jurisdiction should be relinquished in favor of the state administration. *Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *Gordon* v. *Ominsky,* 294 U. S. 186, 188; *Penn Company* v. *Pennsylvania, supra,* p. 197. In the instant cases, not only had the state court first acquired jurisdiction, but there are numerous persons whose claims in relation to these funds are in course of adjudication. Whether or not their claims are valid against the claim of ownership by the United States, they are entitled to be heard and they are indispensable parties to any proceeding for the disposition of the property involved. They have not been made parties to the present suits, and this fact in itself would be a sufficient reason for the District Court to refuse to proceed in their absence. Only the stakeholders are defendants. The adverse claimants are parties to the respective proceedings in the state court and from every point of view the principles governing the convenient and orderly administration of justice require that the jurisdiction of the state court should be respected.

There is no merit in the suggestion that the United States, in presenting its claim in the state proceedings, would be compelled to take the position of a defendant,—being sued without its consent. In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant. We cannot see that there would be impairment of any rights the United States may possess, or any

sacrifice of its proper dignity as a sovereign, if it prosecuted its claim in the appropriate forum where the funds are held.

As we are dealing simply with the question of the exercise of jurisdiction by the District Court, we intimate no opinion upon the merits.

The decrees are affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.